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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10 SACRAMENTO DIVISION
11

12 VACAVILLE SEVENTH DAY ADVENTIST)
CHURCH and MARANATHA)
13 BROADCASTING, INC.,)
14 Plaintiffs,)
15 vs.)
16 SOLANO COUNTY, SOLANO COUNTY)
PLANNING COMMISSION, and Does 1-10,)
17 Defendants.)

Case No. CIV.S-02-0336 MCE KJM

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: March 1, 2004
Time: 9:00 a.m.
Dept.: 3

Trial Date: May 18, 2004

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Plaintiffs have been prevented from spreading the word of their Lord, through the use of a
3 radio ministry situated on Church property, due to Defendants’ failure to recognize that the
4 Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”)¹ has significantly
5 changed the legal landscape. Defendants no longer can ignore legitimate religious needs in their
6 land use planning decisions. Significantly, Defendants have readily admitted that they possess no
7 evidence that the placement of the religious radio ministry would have any negative impact on
8 the church’s neighbors, whether it be increased traffic or noise, or diminution of the agricultural
9 potential of the land.² They further concede that any financial burden placed on Defendants
10 would be de minimis.³

11 Defendants seek to deny the Church the right to exercise its religious freedom because
12 some hypothetical future entity may ask for a variance from zoning laws, and cite the instant
13 case.⁴ What Defendants really are arguing is that they lack the political will to say no in the
14 future, and want this Court to relieve them of the burden. Such a lack of political will hardly
15 creates a compelling interest which would justify the denial of this motion.

16 The Church takes literally the biblical command, “Go ye into all the world, and preach
17 the gospel to every creature,”⁵ and utilizes the airways to comply where possible. The spreading
18 of these teachings is a prerequisite to the second coming of Christ.⁶ These are the same biblical
19

20 ¹ 42 U.S.C. §§ 2000cc et seq. Courts construe RLUIPA broadly to favor the
21 protection of religious exercise. Marria v. Broaddus, 200 F. Supp. 2d 280, 297 (S.D.N.Y. 2002).

22 ² Deposition of Duane Kromm ("Kromm Depo."), 29:1-3, 23-30:5; 31:14-23; 37:3-
23 38:7. Relevant portions of the deposition are attached as Exhibit G to the Declaration of Jeremy
Huie ("Huie Decl.").

24 ³ Kromm Depo., 70:22-75:13.

25 ⁴ Kromm Depo., 40:7-25.

26 ⁵ Mark 16:15.

27 ⁶ Deposition of Stan Caylor (“Caylor Depo.”) 132:20-134:2. Relevant portions of
28 the deposition are attached as Exhibit H to the Huie Decl.

1 commands that the United States Supreme Court has recognized create a constitutionally
2 protected right to spread one’s religious beliefs pursuant to an evangelical mission.⁷

3 Instead of yielding to the commands of RLUIPA, Defendants take the position that
4 spreading the gospel is no different than selling steak knives or hamburgers in insisting that the
5 Church place the radio ministry at a location more to Defendants’ liking. The Church is not
6 selling steak knives, but passing on the word of the Lord as they see it and at the same time
7 building a vibrant religious community. Glen Aufderhar, the one-time chair of the Board of
8 Directors of Maranatha Broadcasting, put it best:

9 We could do it from some other location if we were selling steak knives, but when
10 you’re building community and serving people, you need a sanctuary, a place to
11 meet, a place where they have come to develop a certain trust level in order to
12 even ask for help.

12 * * *

13 There are some things that – that might be possible in a secular setting that are not
14 – not practical or possible in the spiritual setting. So while theoretically you can
15 sell a product or run a continuing education course remotely to build the kind of
16 trust and confidence and community, you really need to be where people are,
17 where they meet on a regular basis, where they can come and fellowship, where
18 they can be involved with the continuing spiritual growth process. It – it really – apart from creating a new
19 local church for spiritual growth.^[8]

20 The fact that a church is more than the sum of its parts, which cannot be separated
21 without affecting the religious mission, has been recognized by courts in finding that
22 government action unnecessarily and substantially burdens protected conduct.⁹ By forcing the
23 Church to separate its evangelical mission from the Church itself, Defendants are in direct
24 violation of both the spirit and letter of RLUIPA. Defendants’ “do it somewhere else” mantra is
25 specifically the type of conduct that Congress sought to prohibit when it defined “[t]he use,
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27 ⁷ Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

28 ⁸ Deposition of Glenn Aufderhar (“Aufderhar Depo.”), 110:10-14, 113:21-114:7;
attached as Exhibit I to the Huie Decl.

⁹ See Cottonwood Christian Center v. Cypress Redev. Agency, 218 F. Supp. 2d
1203, 1227 (C.D. Cal. 2002); Murphy v. Zoning Comm., 148 F. Supp. 2d 173, 189 (D. Conn.
2001); Stuart Circle Parish v. Board of Zoning, 946 F. Supp. 1225, 1239 (E.D. Va. 1996); *cf.*
Kikumura v. Hurley, 242 F.3d 950, 960-61 (10th Cir. 2001).

1 building or conversion of real property as the type of religious exercise' that cannot be
2 substantially burdened absent a compelling interest."¹⁰

3 **II. STATEMENT OF FACTS**

4 **A. THE CHURCH AND RADIO BROADCASTING**

5 Worldwide, the Seventh Day Adventist Church charges itself with the religious mission
6 to spread the Gospel in anticipation of the return of Jesus Christ.¹¹ Adventists believe as a matter
7 of faith that this mission derives from divine mandate, in that God instructed them to "[g]o ye to
8 all the world" and "[t]his gospel of the kingdom shall be preached in all the world for a witness
9 unto the nations, and then shall the end come."¹² Adventists take these words literally as
10 instructions to go forth and preach the Gospel by all available means.¹³ For the Adventists, the
11 command is more than a theoretical requirement, but is a prerequisite for the second coming of
12 Christ.¹⁴

13 To serve in the fulfillment of this great commission, the Church "broadcast[s] radio
14 programs so that every person will have the opportunity to hear God's Good News clearly, in
15 their own language."¹⁵ Radio communications are an integral part of Adventist church ministry.
16 Adventist World Radio broadcasts worldwide 1,000 hours per week in more than 40 languages
17 from 18 transmitter sites around the world.¹⁶ Within the United States, there are at least 30
18 Adventist-owned religious radio ministries, and Adventist religious programming appears on
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21 ¹⁰ Cottonwood, 218 F. Supp. at 1226.

22 ¹¹ Declaration of Glenn D. Toppenberg ("Toppenberg Decl."), Exhibit F.

23 ¹² Huie Decl., Exhibit R at 24:19-24; Toppenberg Decl., ¶ 9.

24 ¹³ Id.

25 ¹⁴ Caylor Depo. at 132:20-134:2.

26 ¹⁵ Toppenberg Decl., ¶ 10.

27 ¹⁶ Id., Exhibit F.

1 2,283 other radio ministries.¹⁷ Whenever and wherever it is possible for Adventists to obtain a
2 newly-available radio frequency, they attempt to do so.¹⁸ The only reason why every Adventist
3 church does not have a radio ministry is simply because enough frequencies are not available.¹⁹
4 Whenever there are frequencies or time slots available, "Adventists have been among the
5 foremost who have gone to the airwaves."²⁰ Pastor Caylor further stated that "when there is a
6 frequency available, a Seventh Day Adventist church will move forward, because it's such a part
7 of the vital interests of our church. Because the Lord said, 'Go ye to all the world.' And one of
8 the best ways to reach that is through the media. And we will do that."²¹

9 The Northern California Conference Association of Seventh Day Adventists owns real
10 property located at 4740 Allendale Road in an unincorporated portion of the County of Solano
11 near Vacaville, California (the "Property"). The Property is located in a district zoned "Rural-
12 Residential" pursuant to the local Zoning Regulations ("Regulations"). The church holds a
13 conditional use permit (No. U-95-03), which allows it to construct and operate a church and
14 school on the Property (the "Use Permit"), and the Property is being so used.

15 On March 31, 2000, Plaintiffs applied to The County for a minor revision to the Use
16 Permit.²² The County granted Plaintiffs' application and pursuant to the minor revision,
17 Plaintiffs were permitted to use a modular unit located on the Property as a caretaker facility.²³
18 The existing permitted use of the modular unit as a caretaker facility complies with all existing
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21 ¹⁷ Toppenberg Decl., ¶ 8; Aufderhar Depo., 90:3-6.

22 ¹⁸ Toppenberg Decl., ¶ 11.

23 ¹⁹ Huie Decl., Exhibit R at 24:13-18; Toppenberg Decl., ¶ 11.

24 ²⁰ Huie Decl., Exhibit R at 24:9-12; Toppenberg Decl., ¶ 11.

25 ²¹ Huie Decl., Exhibit R at 24:19-24; Toppenberg Decl., ¶ 11.

26 ²² Toppenberg Decl., Exhibit B.

27 ²³ Id., Exhibit C.

1 laws and regulations.²⁴

2 On July 9, 1996, the Vacaville Church voted at business session to officially incorporate
3 Plaintiff Maranatha Broadcasting, Inc. (“Maranatha”) as an outreach ministry of the Vacaville
4 Church and to house its operation.²⁵ Maranatha means the Lord is coming.²⁶ Adventists
5 organize themselves in a structure of ministries, with each ministries performing a separate
6 spiritual function.²⁷ The Vacaville Church runs numerous ministries including Pathfinders,²⁸ a
7 religious school students, and a family ministry.

8 The ministries do not function as separate independent organizations, but as a integrated
9 spiritual program whose purpose is to create a thriving spiritual community.²⁹ It was in this vein
10 that the Vacaville Church wished to locate a radio ministry on the Church property. There was
11 little interest in the Church in locating the radio ministry outside.³⁰ The Church saw the radio
12 ministry as part and parcel of its larger mission. Each ministry was to interact with the other.
13 For instance, the family ministry was to use the radio ministry to connect with others who might
14 be interested in participating.³¹ Stan Caylor, the Pastor of the Church, described the synergy
15 created when the different components of the Church were allowed to interact.

16 [The] school needs to be there, interacting with the church body. And the way
17 those things interact together is magical, wonderful. The community services has
18 to be there, interacting. The Sabbath school has to be there. We can run Sabbath
19 schools in people’s homes. Why is that not as good as having it on the plant,
because the dynamics – when you get people together, something special happens.

20 ²⁴ Second Amended Response to Request for Admission No. 4, attached as Exhibit
21 T to the Huie Decl.

22 ²⁵ Huie Decl., Exhibit Q at ¶ 10.

23 ²⁶ Aufderhar Depo., 60:15-17.

24 ²⁷ Toppenberg Depo., 74:16-76:9.

25 ²⁸ Pathfinders is patterned after the Boy Scouts. Aufderhar Depo., 108:5-112:16.

26 ²⁹ Aufderhar Depo., 108:5-112:16.

27 ³⁰ Caylor Depo., 116:8-20.

28 ³¹ Id., 120:8-16.

1 And one part of the life of the church interacts with another part of the life of the
2 church, and they give life to each other. If you understand, it's just part of
3 dynamics. It is a part of a spiritual dynamic. And so you need to have these
4 things kind of connected. And if the radio ministry has a much better opportunity
5 of really reflecting, integrating sites in the life of the church and benefitting from
6 the church, and benefitting from the radio ministry, and dialogue and
7 communications, it's going to be greatly enhanced, just as much so as having a
8 school on the premises.

9 * * *

10 As I have been trying to say in so many different synergies, it's no different as I
11 said with the Pathfinders. It's a part of the life of the church. And it needs to be
12 celebrated. You know, something unique about church, it's not just – it's not just
13 what you teach. It's the synergy. It's the life that you know, and you're part of
14 each other, and you need to be there in order to make that happen. If the school
15 were somewhere else, it wouldn't be a viable – it wouldn't be as strong. It would
16 be always struggling, but it's a part of a body.^[32]

17 The Church's concerns in deciding to place the radio ministry on Church property was
18 that without the geographical connection that the two would become separated and the station
19 would lose its spiritual focus. Again, Pastor Caylor stated that

20 [t]he radio station could easily become just a business enterprise somewhere else
21 if it's not closely connected to the - - integrated into the life of the church. And in
22 many cases, I think that has happened. The church is the life, and they have to be
23 connected. And when that are not connected, they tend to lose their spontaneity.
24 They tend to lose their responsiveness. They tend to lose a sense of vision as to
25 what they are all about, and a balancing effect that comes from being together.
26 It's all this interaction that is necessary to keep a church alive.^[33]

27 To this end, the Church filed an application with Defendants for a minor revision to the
28 Use Permit requesting that they be permitted to use the existing caretaker facility structure as a
29 radio broadcasting station.³⁴ The physical structure of the existing facility would not be altered,
30 other than the addition of an outdoor broadcasting dish of approximately eight-foot diameter,
31 which would beam a signal to an off-site tower and the station would be used solely for nonprofit
32 religious broadcasting, pursuant to the FCC license.³⁵

33 Caylor Depo. 137:22-138:15, 139:17-140:3.

34 Id., 141:13-23.

35 Toppenberg Decl., Exhibit E.

36 See Toppenberg Decl., Exhibit A.

1 **B. THE MINOR REVISION APPLICATION AND ITS DENIAL**

2 The Church’s application for a minor revision was assigned to Matthew Walsh, a senior
3 planner for Defendants. As a senior planner, Mr. Walsh’s responsibilities were to investigate and
4 analyze applications and to determine, among other things, the impact that the application would
5 have on the effected neighborhoods and to prepare a report outlining the Planning Department’s
6 recommendation. Recommendations in the report typically were made only after all the facts had
7 been gathered.³⁶ Contrary to this general practice, and before Mr. Walsh could conduct any
8 investigation, he was instructed by his superiors that a decision had already been made to deny
9 the Church’s application. The decision to deny the application without any investigation was
10 made by the Birgitta Corsello, the head of the Department of Environmental Management, and
11 members of Defendants County Counsel.³⁷ The decision was made without any knowledge as to
12 whether the granting of the application would have any impact, negative or otherwise, on the the
13 Church’s.³⁸ Consistent with his instructions, Mr. Walsh’s report recommended that the
14 Church’s application be denied. The Solano County Planning Commission concurred with the
15 preordained recommendation and the Church appealed the decision to the Board of Supervisors.³⁹

16 The Board of Supervisors also denied the appeal.⁴⁰ In deciding to deny the appeal, the
17 Board did not review any traffic studies or any studies relating to the physical impact that the
18 radio ministry would have on the Church’s neighbors. Nor did they see any evidence that the
19 radio ministry would in fact cause any problems for the Church’s neighbors.⁴¹ The Board never
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21 ³⁶ Deposition of Michael Yankovich (“Yankovich Depo.”), 37:8-12. Relevant
22 portions of the deposition are attached as Exhibit J to the Huie Decl.

23 ³⁷ Deposition of Burgitta [sic] Corsello (“Corsello Depo.”), 29:11-18. Relevant
24 portions of the deposition are attached as Exhibit K to the Huie Decl.

25 ³⁸ Id., 69:23-70:6.

26 ³⁹ Huie Decl., Exhibits N and O.

27 ⁴⁰ Id., Exhibit U.

28 ⁴¹ Kromm Depo., 29:1-3, 29:23-30:5.

1 looked at whether the granting of the application would have a greater or lesser impact on the
2 neighbors than the continued use of the structure as a caretaker facility.⁴²

3 Rather than the effect on the Church’s neighbors, the Board was more concerned with
4 how the granting of the application would effect what they considered the larger issues, such as
5 agricultural land use, and financial and infrastructure issues.⁴³ However, Supervisor Kromm,
6 testified that the granting of the application would have no effect on agricultural land use since
7 the property was not be used for agricultural uses.⁴⁴ As to the other issues, he also admitted that
8 any negative effect on in fracture or the County’s finances would be deminimis.⁴⁵ The Board’s
9 primary concern was that the granting of the application would start a trend.⁴⁶

10 **III. ARGUMENT**

11 **A. LEGAL STANDARD FOR PRELIMINARY INJUNCTION**

12 To obtain a preliminary injunction, a plaintiff traditionally must “demonstrate: (1) a
13 strong likelihood of success on the merits; (2) the possibility of irreparable injury; (3) greater
14 hardship to the plaintiff than to the defendant; and (4) that the public interest favors granting the
15 injunction.”⁴⁷ In some instances, an alternative test is appropriate: “[W]here the balance of the
16 hardships is overwhelmingly in favor of the movant, a preliminary injunction may be issued upon
17 a less rigorous showing of likelihood of success on the merits so long as the plaintiff’s
18 allegations raise ‘serious questions’ as to the merits.”⁴⁸

21 ⁴² Id., 46:5-47:8.

22 ⁴³ Id., 68:16-25; 72:24-73:13.

23 ⁴⁴ Id., 37:3-38:7.

24 ⁴⁵ Id., 75:8-17.

25 ⁴⁶ Id., 40:7-25.

26 ⁴⁷ Cottonwood, 218 F. Supp. 2d at 1216-17.

27 ⁴⁸ Id. at 1232, quoting Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674
28 (9th Cir. 1988).

1 In the present case, good cause exists for issuance of a preliminary injunction under either
2 test. Plaintiffs satisfy all four elements of the traditional test for injunctive relief. Moreover,
3 Plaintiffs also satisfy the alternative test because the hardships are overwhelmingly in their favor
4 and their allegations raise serious questions as to the merits of their claim.

5 **B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RLUIPA CLAIM**

6 RLUIPA provides in pertinent part:

7 No government shall impose or implement a land use regulation in a manner that
8 imposes a substantial burden on the religious exercise of a person, including a
9 religious assembly or institution, unless the government demonstrates that
10 imposition of the burden on that person, assembly, or institution (A) is in
11 furtherance of a compelling governmental interest; and (B) is the least restrictive
12 means of furthering that compelling governmental interest. [⁴⁹]

13 “In passing RLUIPA, Congress required local governments to be sensitive to the values
14 of religious freedom and expression. It directed that substantial burdens be placed on the
15 exercise of religion only to the extent necessary to accomplish compelling governmental
16 interests.”⁵⁰ RLUIPA broadly protects religious exercise, which it defines as “any exercise of
17 religion, whether or not compelled by, or central to, a system of religious belief”⁵¹ relating to the
18 “use, building, or conversion of real property for the purpose of religious exercise is considered
19 to be in itself a “religious exercise.”⁵² Thus, RLUIPA contemplates that Plaintiffs’ conversion
20 of the modular building into a radio ministry for the purpose of religious broadcasting qualifies
21 as “religious exercise” within the statute.
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23
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25 ⁴⁹ 42 U.S.C. § 2000cc(a)(1).

26 ⁵⁰ Murphy, 148 F. Supp. 2d at 191.

27 ⁵¹ 42 U.S.C. § 2000cc-5(7)(A).

28 ⁵² Id. at § 2000cc-5(7)(B).

1 **1. Adventists Exercise Their Religion Through Evangelical Radio**
2 **Broadcasting.**

3 “Defendants do not dispute that Plaintiffs believe that radio broadcasting is a means of
4 fulfilling a mandate of their faith to proselytize.”⁵³ Under RLUIPA there can be no question that
5 radio broadcasting comes within the broad definition of religious exercise. Such spreading the
6 word of the Lord “occupies the same high estate under the First Amendment as do worship in the
7 churches and preaching from the pulpits. It has the same claim to protection as the more
8 orthodox and conventional exercises of religion.”⁵⁴ In Murdock v. Pennsylvania, the Court held
9 that appellants’ hand-distribution of religious literary materials was an age-old form of
10 missionary evangelism that qualified for First Amendment protection of religious activity.⁵⁵
11 Appellants, who were Jehovah’s Witnesses, took “literally the mandate of the Scriptures, ‘Go ye
12 into all the world, and preach the gospel to every creature.’ In doing so, they believe[d] that they
13 [were] obeying a commandment of God.”⁵⁶ The Court recognized that the right to spread one’s
14 religious beliefs pursuant to an evangelical mission is a constitutionally protected right.⁵⁷

15 **2. The County’s Denial of Plaintiffs’ Application Imposed A Substantial**
16 **Burden On Plaintiffs’ Exercise of Their Religion.**

17 While RLUIPA does not expressly define what constitutes a “substantial burden,” courts
18 interpreting the Act have found that state action substantially burdens religious conduct when it
19 forces adherents to forgo or modify the practice of one’s religion.⁵⁸ “In determining if a
20 government action imposes a substantial burden on the exercise of religion, ‘[t]he proper and
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22 ⁵³ Defendants’ Memorandum of Points and Authorities in Support of Motion to
23 Dismiss at 18, attached as Exhibit P to the Huie Decl.

24 ⁵⁴ Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

25 ⁵⁵ Id.

26 ⁵⁶ Id.

27 ⁵⁷ Id.

28 ⁵⁸ E.g. Murphy, 148 F. Supp. 2d at 189.

1 feasible question for the court is simply whether the practices in question are important to the
2 votaries of the religion.”⁵⁹

3 In determining whether something constitutes a substantial burden, one crucial
4 consideration is that under RLUIPA, there is no need for the religious conduct at issue either to
5 be central to the adherents religious faith or mandatory.⁶⁰ This stems from RLUIPA’s definition
6 of “religious exercise” to encompass “any exercise of religion, whether or not compelled by, or
7 central to, a system of religious belief” relating to “[t]he use, building or conversion of real
8 property for the purpose of religious exercise”⁶¹

9 In considering whether any particular state action substantially burdens a religious
10 exercise, the fact that the exercise somehow can take place at another location is not necessarily a
11 relevant consideration, much less determinative. It is hornbook constitutional law that the fact
12 that one’s freedom cannot be “abridged on the plea that it may be exercised in some other
13 place.”⁶²

14 Any other rule would effectively strip RLUIPA of any relevance, since it is hard to
15 conceive of any religious act that could not take place somewhere else. Moreover, in including
16 “conversion of real property” within the definition of religious exercise Congress surely intended
17 that religious bodies be able to alter their real property without the need to show that there was
18 no other location for the religious conduct to take place. A substantial burden exists where the
19 government is attempting to prevent a religious body from converting an existing structure on its
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23 ⁵⁹ Charles v. Verhagen, 200 F. Supp. 2d 937, 945 (D. Wisc. 2002), quoting Mack v.
24 O’Leary, 80 F.3d 1175, 1180 (7th Cir. 1996).

25 ⁶⁰ Kikumura v. Hurley, 242 F. 3d 950, 960-61 (10th Cir. 2001); Murphy, 148 F.
26 Supp. 2d at 188; Stuart Circle, 946 F. Supp. at 1237.

27 ⁶¹ RLUIPA, 42 U.S.C. § 2000cc-5(7). Pre-RLUIPA cases which required that the
28 belief be mandated, like Bryant v. Gomez, 46 F. 2d 948 (9th Cir. 1994), no longer are relevant.

⁶² Schneider v. New Jersey, 308 U.S. 147, 151-52 (1939)

1 property⁶³ or where the government activity interferes with the church's ability to conduct its
2 affairs so as to active a sense of religious community or a synergy between the various ministries
3 of the church.⁶⁴

4 **a. Preventing a Church from converting its existing property to a**
5 **religious use constitutes a substantial burden**

6 There is a significant difference between state action that prevents a church from
7 purchasing property for religious use in the first instance and conduct which restricts how the
8 church can use existing property. Where the issue is whether a church may locate in a particular
9 part of a city or county, the presence of alternate locations within the jurisdiction is a very
10 relevant consideration.⁶⁵ However, courts have distinguished that circumstance from instances
11 where a church already exists on the property and the church is seeking to convert part of the
12 property to another religious use.⁶⁶

13 The Court in Western Presbyterian Church v. The Board of Zoning Adjustment of the
14 District of Columbia in discussing the difference stated:

15 Once the zoning authorities of a city permit the construction of a church on a
16 particular locality, the city must refrain, absent extraordinary circumstances, from
17 in any way regulating what religious functions the church may conduct. Zoning
18 boards have no role to play in telling a religious organization how it may practice
19 its religion. A city cannot use its zoning laws to regulate the way a particular
20 religion offers its prayers or the way a religion celebrates its holidays.^[67]

21 ⁶³ RLUIPA, 42 U.S.C. §2000cc-5(7); Western Presbyterian Church v. Board of
22 Zoning Adjustment, 862 F. Supp. 538, 545-46 (D.D.C. 1994).

23 ⁶⁴ Kikumura, 242 F. 3d at 961; Murphy, 148 F. Supp 2d at 189.

24 ⁶⁵ Christian Gospel v. City & County of San Francisco, 896 F. 2d 1221 (9th Cir.
25 1990).

26 ⁶⁶ E.g. Vineyard Christian Fellowship of Evanston v. City of Evanston, 250 F. Supp.
27 2d 961, 987 (N.D. Ill 2003) (distinguishing Alpine Christian Fellowship, 870 F. Supp. 991 (D.
28 Colo. 1994) and Western Presbyterian Church, 862 F. Supp. 538 from Christian Gospel on basis
that Christian Gospel dealt with the purchase of new property).

⁶⁷ Western Presbyterian Church, 862 F. Supp. at 546.

1 **b. Where the government activity interferes with the church’s ability to**
2 **conduct its affairs so as to activate a sense of religious community or a**
3 **synergy between the various ministries of the church, a substantial**
4 **burden exists.**

5 Courts recognize that a church is more than just a sum of its parts and that where
6 government activities interfere with the church’s ability to build a religious community or a
7 synergy between its various ministries, such conduct creates a substantial burden. A classic
8 example of this concept, although pertaining to the portion of RLUIPA dealing with prisons, is
9 the case of Kikumura v. Hurley.⁶⁸

10 In Kikumura, the plaintiff sought an injunction compelling prison authorities to allow the
11 visitation of a pastor who had served as a missionary in Japan, the plaintiff’s native country. The
12 prison authorities were not denying plaintiff access to all pastors, but just to this particular one.
13 The Tenth Circuit, which reversed the District Court, found that “the denial of a pastoral visits
14 from Reverend Rickard is a ‘substantial burden’ because Reverend Rickard is particularly well-
15 suited to provide religious assistance to Plaintiff. Reverend Rickard . . . is a Christian minister
16 who is also familiar with the spiritual culture of Japan, Plaintiffs homeland.”⁶⁹

17 If religious parts were interchangeable, the Tenth Circuit could not have reversed the
18 District Court. However, the Court recognized that religious practices require more than just
19 reading of prayers, while ignoring the relationships that build a necessary spiritual community.
20 In the case of Kikumura, it was a community of two individuals that was pertinent. However,
21 courts have applied the same analysis when looking at whether it would allow particular
22 activities to take place on church property.

23 In Stuart Circle Parish v. Board of Zoning Appeals,⁷⁰ the City of Richmond sought to
24 limit the number of homeless persons that could be fed by plaintiffs. Since the City did not seek
25 to prohibit the feeding of the homeless, it argued that the prohibition did not constitute a

26 ⁶⁸ 242 F. 3d 950.

27 ⁶⁹ Id. at 961.

28 ⁷⁰ 946 F. Supp. 1225 (E.D. Va. 1996).

1 substantial burden. Church members who felt the compulsion to feed the homeless could do so
2 at other locations or the homeless ministry could offer its services at several churches
3 simultaneously so as to keep within the numerical limitations.⁷¹ The City argued that any burden
4 was not substantial, but only a mere inconvenience that was not protected under RLUIPA.⁷² In
5 rejecting the City's contention, the district court focused on the role that the feeding of the
6 homeless played in the overall church community.

7 However, the plaintiffs showed that it was central to their faith to invite the
8 homeless into the church in order to establish a climate of worship. This climate
9 simply would not exist if the Meal Ministry was not conducted in a church or if
10 the volunteers offered it in some non-sectarian fashion. Moreover, witnesses also
11 testified that it is the gathering together as a community to share in the meal that
12 constitutes the essence of their faith. This communal gathering would be lost, or
13 at least greatly diminished, if the participants were forced to move elsewhere or to
14 be diversified. Finally, as to the suggestion that the meals be shared among several
15 of the churches, testimony showed that the synergy of the group and the continuity
16 of meeting with the same people in the same atmosphere would be lost, rendering
17 the practice of their faith less effective and less meaningful. For all of these
18 reasons, plaintiffs have raised substantial issues which tend to prove that the
19 ordinance would require them to "refrain from religiously motivated conduct [or]
20 inhibit[s] or constrain[s] conduct or expression that manifests a central tenet of a
21 person's religious beliefs"⁷³

22 Similarly in Murphy v. Zoning Commission,⁷⁴ the district court looked at whether the
23 City could properly limit the number of persons the number of persons who could attend a prayer
24 meeting at the plaintiffs' home. The City argued that no substantial burden existed because it
25 had not prohibited prayer sessions in general, and those persons who could not attend the
26 sessions at the plaintiffs' home could pray somewhere else. The Murphy court rejected the
27 City's contention because "plaintiffs exercise their faith in part by praying with others, with the
28 express purpose of helping those in need through prayers."⁷⁵

71 Id. at 1238.

72 Id.

73 Id. at 1239. Since Stuart Circle Parish predates RLUIPA, the Court's statement
that belief must be central to their faith is no longer applicable. Murphy, 148 F. Supp. 2d at 189.

74 148 F. Supp. 2d 173.

75 Id. at 189.

1 In each of the above situations the religious activity could have been performed
2 somewhere else. In Kikumura, another preacher could have prayed with plaintiff. In Stuart
3 Circle Parish, parishioners could have fed the homeless elsewhere. And in Murphy, those denied
4 the right to pray with plaintiffs could have prayed somewhere else. However, in each instance
5 somewhere else would have denied the adherents the religious community that was essential for
6 the spiritual experience that was critical.

7 **c. Defendants' conduct substantially burdened the Church's religious**
8 **activities.**

9 Any argument that no substantial burden exists due to the fact that the radio station can be
10 located offsite fails as a result of the express provisions of RLUIPA, as well as interpretive case
11 law. The Church's desire to turn its caretaker facility into a radio station falls squarely within the
12 definition of "conversion" under RLUIPA's definition of religious exercise.⁷⁶ Moreover, the radio
13 ministry is not to be operated within a vacuum separate and apart from the Church's other
14 ministries.

15 The radio ministry is intended to work with the other ministries of the Church. For
16 instance, the Church also operates a family ministry whose members would be expected to utilize
17 the radio ministry to further their goals.⁷⁷ The same is true for the Church's Pathfinders
18 ministry.⁷⁸ No matter what the Church ministry is, from preaching of the gospel on Saturday to
19 preaching the message of a healthy life, they are to operate within the confines of the entire
20 church, including the radio ministry. To exclude the radio ministry from this equation is to
21 exclude it from the life blood of the church.

22 The synergies described in Stuart Circle Parish, Kikumura and Murphy operate in this
23 case as well. There is absolutely no evidence that the radio ministry or the Church will benefit by
24 separating the two. To the contrary, the opposite is true. Defendants would make no distinction
25

26 ⁷⁶ RLUIPA, 42 U.S.C. § 2000cc-5(7).

27 ⁷⁷ Caylor Depo., 120:9-16.

28 ⁷⁸ Aufderhar Depo., 108:5-112:16.

1 between the selling of commodities, such as steak knives or hamburgers, or the passing on of
2 faith. The latter can be done anywhere, since it involves no sense of community or spiritual
3 guidance. The former cannot. As Pastor Aufderhar stated:

4 Some of those kinds of community service things that are available to people of
5 all faiths or no faith, can -- can best be organized out of the church and can best be
6 appreciated or accepted out of the church. We could do it from some other
7 location if we were selling steak knives, but when you're building community and
8 serving people you need a sanctuary, a place to meet, a place where they have
9 come to develop a certain trust level in order to even ask for help.^[79]

8 One does not build a religious community through separation. To require such separation
9 substantially burdens the Church's exercise of its religion.

10 **3. Defendants' Denial of Plaintiffs' Application Was Not the Least Restrictive**
11 **Means of Furthering a Compelling Governmental Interest.**

12 Zoning ordinances may substantially burden the exercise of religion only when they are
13 the least restrictive means of furthering a compelling government interest.⁸⁰ It is not enough that
14 the zoning ordinance further a substantial interest; only a compelling interest can justify the
15 burdening of religious exercise rights.⁸¹ Compelling government interests include: protection of
16 neighborhoods from traffic, noise, and litter; protection of the the health and safety of the
17 neighborhood; and preventing damage to adjoining parcels of land by ensuring compliance with
18 drainage and grading codes.⁸²

19 There is no contention in this case that the radio ministry would increase traffic, noise or
20 litter, adversely affect the health or safety of the neighborhood, or damage adjoining parcels.⁸³
21 Nor was it ever a concern of Defendants that the radio ministry might have such a negative

22 ⁷⁹ Id. at 110:6-14.

23 ⁸⁰ 42 U.S.C. § 2000cc(a)(1)

24 ⁸¹ Cottonwood, 218 F. Supp. 2d at 1228

25 ⁸² Christian Gospel Church, Inc., 896 F.2d at 1224; Murphy, 148 F. Supp. 2d at 187.

26 ⁸³ Kromm Depo., 29:1-3, 29:23-30:5; Yankovich Depo., 30:16-31:10; Corsello
27 Depo., 69:23-70:6; Deposition of Matthew Walsh ("Walsh Depo."), 34:23-35:7, 60:2-12,
28 attached as Exhibit M to the Huie Decl.

1 impact. Defendants decided to deny the application for the permit for the radio ministry without
2 even studying any potential impacts.⁸⁴

3 **a. No compelling interest exists**

4 Defendants have identified various interests which they contend are compelling, both in
5 depositions and written discovery. In deposition, Supervisor Duane Kromm, an individual
6 designated by Defendants to testify on their behalf on the issue of Defendants compelling
7 interest,⁸⁵ identified the fear that allowing the radio ministry would start a trend as the compelling
8 interest.⁸⁶ Plaintiffs served Defendants with interrogatories asking them to identify each and
9 every compelling government interest which Defendants asserted was applicable to their conduct
10 in this matter.⁸⁷ Defendants responded by identifying: (1) leasing of the property to Maranatha
11 would violate the provisions of the Map Act, Government Code section 66410, et seq.; (2) use of
12 the property as a radio broadcasting station does not comply with Solano County zoning
13 ordinances; and (3) Article 1 of the California Constitution prohibits the County from granting a
14 benefit to a particular religion and/or religion in general that is not granted to society at large.⁸⁸

15 None of these constitute compelling government interests – they merely reflect the
16 general government interest in upholding the constitutional, statutory, and regulatory law.

17 **(1) Other than through the lack of political will, the instant matter**
18 **need not create any trend.**

19 Supervisor Kromm could not identify a single significant negative impact that allowing
20 the radio ministry to operate on the land would have. Instead, he identified the issue that he
21 relied on being the fear that allowing the radio ministry would start a trend that would erode
22

23
24 ⁸⁴ Walsh Depo., 31:4-32:4.

25 ⁸⁵ Huie Decl., Exhibits W and X.

26 ⁸⁶ Kromm Depo., 40:7-25.

27 ⁸⁷ Huie Decl., Exhibit V at Interrogatory No. 1.

28 ⁸⁸ Id.

1 agricultural land and hasten commercial development in residential neighborhoods.⁸⁹
2 Admittedly, the radio ministry would have no effect on agricultural trends since the land is
3 already zoned for residential use.⁹⁰ However, while not pertaining to the issue at hand, he
4 claimed theoretically that any type of development will “bring in “more traffic, more people,
5 more 24 x 7 type activity.”⁹¹ “[E]very time you make a decision in government that says I'm
6 giving a break to somebody -- and it doesn't matter if it is a church or a business or a person -- the
7 next person, then, wants the same break.”⁹²

8 Critically, Defendants are not arguing that if the application to allow the radio ministry is
9 granted, they must allow increased commercial activity in residential zones. Defendants are
10 arguing only that future applicants may cite the instant case as a reason for granting an
11 application. Defendants’ claim is highly speculative at best, given that Defendants are focusing
12 hypothetical future applications. Defendants “suggest no more than a possibility” of harm, which
13 is insufficient to establish a compelling interest.⁹³

14 What Defendants really are arguing is that they do not want to have to make politically
15 risky decisions in denying future applications. They would rather not have to explain why the
16 radio ministry was allowed and a McDonalds is not. Ignoring the fact that RLUIPA should
17 create a reason to distinguish McDonalds from a radio ministry, the fact that Defendants are
18 really only seeking political cover, rather than community enhancement, can be seen in the
19 alternatives to the granting of the Church’s application that Defendants proposed.

20 Defendants proposed that instead of allowing the conversion of the caretaker’s facility
21 that the Church should apply to operate the radio ministry as a “rural residential enterprise” or to
22

23
24 ⁸⁹ Kromm Depo., 34:8-35:16.

25 ⁹⁰ Id., 37:24-38:7.

26 ⁹¹ Id., 40:7-19.

27 ⁹² Id., 73:5-8.

28 ⁹³ Sherbert v. Verner, 374 U.S. 398, 407 (1963).

1 use remote broadcasting equipment.⁹⁴ While these proposed alternatives could result in “more
2 traffic, more people, more 24 x 7 type activity,” they do not allow a future applicant to refer to
3 the ministry as a reason to approve their project.⁹⁵

4 A “rural residential enterprise” allows a home business, which is clearly secondary to the
5 residential use. It allows the employment of a single employee, but does not limit the number of
6 persons living in the house from working on the business.⁹⁶ The application for the radio
7 ministry limits the number of building occupants to five.⁹⁷ However, as a rural residential
8 enterprise the church can have a family of five, ten or more occupy the building with the
9 increased traffic and noise. The same is true of Defendant’s suggestion that the Church use
10 mobile vans, in conjunction with an off-site office.⁹⁸ In making that suggestion, Defendants had
11 no idea whether the use of mobile vans would cause more traffic problems or neighborhood
12 disruption.⁹⁹ Obviously, the proposed alternatives were not based on what was necessarily
13 beneficial to the Church’s neighbors.

14 This is not a case where Defendants will not be able to decide that future commercial
15 development should not be allowed.¹⁰⁰ Land use decisions by their very nature are individualized
16 decisions. It cannot be a compelling interest that government agencies do not want to make the
17 decision.

20 ⁹⁴ Huie Decl., Exhibit V at Defendants’ Amended Response to Interrogatory No. 2.

21 ⁹⁵ Kromm Depo, 40:7-19.

22 ⁹⁶ Section 28-50(b)(6) of the Solano County Zoning Regulations, attached as Exhibit
23 Y to the Huie Decl.

24 ⁹⁷ Toppenberg Decl., Exhibit E.

25 ⁹⁸ Huie Decl., Exhibit Y; Corsello Depo., 47:16-48:2.

26 ⁹⁹ Walsh Depo., 69:8-79:19.

27 ¹⁰⁰ Compare United States v. Lee, 455 U.S. 252 (1982) (Exemptions to tax structure
28 based on religious opposition to program would not allow tax system to function. Id. at 260.).

1 **(2) Map Act and zoning laws**

2 It is nonsensical that, absent some real negative impact on a community, that the fact that
3 a religious land use violates land use regulations could be a sufficient “compelling government
4 interest” to satisfy RLUIPA. Congress enacted RLUIPA precisely to address the conflict
5 between religious land use and government land use regulation. RLUIPA limits the
6 government’s ability to create a regulation that substantially burdens religious land use unless
7 there is a compelling government interest. The existence of the offending regulation itself is not
8 a compelling interest justifying its existence. This circular reasoning would make RLUIPA
9 meaningless.

10 **(3) No-Preference Clause**

11 The County contorts the California Constitution to strike down religious protections for
12 all with the excuse of not wanting to prefer a few. First, this position is untenable under
13 California law. In East Bay Asian Local Development Corporation v. State,¹⁰¹ the California
14 Supreme Court rejected the same argument in regards to a No- Preference Clause challenge to a
15 state statute exempting religiously affiliated organizations from historic landmark preservation
16 laws on hardship grounds. After concluding that the exemption did not violate the federal
17 Establishment Clause, it followed “that the exemption is neither a governmental preference for or
18 discrimination against religion.”¹⁰² The court held:

19 Neither the history nor the language of the no-preference clause supports
20 plaintiffs’ argument that the clause bans governmental accommodation of religion
21 or religious belief in general. We do not agree, therefore, that the no-preference
22 clause bars exemption from landmark preservation ordinances for property owned
23 by a religious entity as a constitutionally impermissible preference for religion and
24 discrimination against nonreligious owners of noncommercial property subject to
25 landmark designation.^[103]

26 Should the Court find that the No-Preference Clause creates a government interest, the
27 state constitution is preempted by the federal RLUIPA. Thus, Congress’ clear upholding of

28 ¹⁰¹ 24 Cal. 4th 693, 698, 720 (2000).

¹⁰² Id., at 719.

¹⁰³ Id. at 720.

1 religious land use rights should trump state concerns over preferential treatment.

2 **b. Defendants did not use the least restrictive means**

3 Even if a RLUIPA defendant can demonstrate the existence of a compelling government
4 interest furthered by the government action, it still “must show that there are ‘no other alternative
5 forms of regulation’ which would fulfill the state interest.”¹⁰⁴ To satisfy the least restrictive
6 means prong of RLUIPA, the defendant’s actions must directly address the compelling
7 government interest identified. The government must show that its interests could not be
8 achieved by narrower state action that burdens the Church to a lesser degree.

9 In discovery, Defendants were requested to identify how the least restrictive means were
10 achieved in this case. In response they identified several things that the Church could do, short
11 of having the application for a minor revision being granted, in order to allow the radio ministry
12 to exist on Church property. These were: Plaintiffs could: (1) locate the radio ministry in a
13 different zoning district; (2) seek a legislative change of the zoning regulations; or (3) attempt to
14 conform the radio ministry use to qualify as a “rural residential enterprise.”¹⁰⁵

15 Defendants response evidences a markedly obvious misunderstanding of the least
16 restrictive alternative analysis. The analysis focus is not on the conduct of the Church, and what
17 the Church could do, but on Defendants and how Defendants could achieve their goals without
18 denying the application.¹⁰⁶

19 For instance, in Murphy, the zoning commission ordered homeowners to cease and desist
20 from holding prayer meetings involving more than 25 persons in their home. The commission
21 claimed that it had a compelling government interest in the increased level of traffic on the street,
22 and the safety issues that are inherent in an increased volume of traffic. The Murphy court noted
23 that the commission issued an opinion which attempted to control the number of people present
24

25 ¹⁰⁴ Murphy, 148 F. Supp. 2d at 190, quoting Sherbert v. Verner, 374 U.S. 398, 407
26 (1963).

27 ¹⁰⁵ Huie Decl., Exhibit V (Defendants’ Amended Response to Interrogatory No. 2).

28 ¹⁰⁶ Murphy, 148 F. Supp. 2d at 176-78.

1 in the plaintiffs’ home instead of taking action which would directly regulate the increased
2 volume of traffic on Sunday afternoons. Consequently, the cease and desist order was not the
3 least restrictive means of protecting the health and safety of the community.¹⁰⁷

4 In the present case, far from utilizing the least restrictive means, Defendants have “done
5 the equivalent of using a sledgehammer to kill an ant.”¹⁰⁸ Defendants cannot demonstrate that
6 denial of Plaintiffs’ application constituted the least restrictive means of furthering a compelling
7 government interest. To the contrary, the extreme measure of wholly preventing the religious
8 radio ministry use on the church property was the most restrictive alternative. If Defendants did
9 not want to start a trend, the least restrictive means would be to grant Plaintiffs’ application and
10 tell future applicants No!

11 **C. PLAINTIFFS ARE SUFFERING IRREPARABLE HARM.**

12 “Irreparable harm means that type of injury for which a monetary award would fail to be
13 adequate compensation.”¹⁰⁹ “In the context of a motion for preliminary injunction, ‘violations of
14 First Amendment rights are commonly considered irreparable injuries.’”¹¹⁰ Specifically, since
15 RLUIPA “was enacted for the express purpose of protecting the First Amendment rights of
16 individuals, the allegation that defendants have violated the statute also triggers the same
17 concerns that led courts to hold that these violations result in a presumption of irreparable
18 harm.”¹¹¹

19 Here, Plaintiffs assert that the County has violated RLUIPA, a statute expressly designed
20 to protect Plaintiffs’ constitutional rights with respect to religious exercise. The impairment of
21 Plaintiffs’ free exercise rights constitutes an irreparable harm which a monetary award could not
22

23 ¹⁰⁷ Id. at 190.

24 ¹⁰⁸ Cottonwood, 218 F. Supp. 2d at 1229.

25 ¹⁰⁹ Murphy, 148 F. Supp. 2d at 180.

26 ¹¹⁰ Charette v. Town of Oyster Bay, 159 F.3d 749, 755 (2d Cir. 1998), quoting Bery
27 v. City of New York, 97 F.3d 689, 693 (2d Cir. 1996).

28 ¹¹¹ Murphy, 148 F. Supp. 2d at 180-81.

1 adequately compensate.

2 **D. THE LACK OF THE ABILITY TO CONDUCT A RADIO MINISTRY IS A GREAT HARDSHIP**
3 **TO PLAINTIFFS, WHEREAS ALLOWANCE OF THE RADIO MINISTRY POSES NO**
4 **HARDSHIP TO THE COUNTY**

5 More so than other denominations, the Adventist faith has seized upon the broadcast
6 medium to evangelize. Plaintiffs' purpose in utilizing the proposed radio ministry would be to
7 fulfill the divine mandate to spread the Gospel.¹¹² By preventing Plaintiffs from operating their
8 station on church property, Defendants have prevented Plaintiffs from worshiping in the manner
9 of their choosing according to their faith. The County denied Plaintiffs' application in May
10 2002, meaning that Plaintiffs have lost more than a year of the benefit of the synergy of the
11 church and its radio ministry. This is a substantial hardship on Plaintiffs, that can not be
12 quantified or remunerated.

13 If the Court grants a preliminary injunction, there will be no hardship to Defendants. The
14 modular building that will be used for the radio ministry already is in place on the property and
15 permitted. There will be no changes to the structure of the building. The only difference will be
16 the addition of a broadcasting dish, no more than eight feet in diameter, that will beam a signal to
17 an off-site tower. In this rural-residentially zoned neighborhood, the new dish will be no more
18 burdensome than a home satellite dish. Thus, there will be no hardship on Defendants created by
19 allowing Plaintiffs to go forward with their religious radio ministry without government
20 interference.

21 In light of the hardship on Plaintiffs of not being able to evangelize as their faith demands
22 and the lack of any impact whatsoever on Defendants if this motion is granted, equity requires
23 that the Court enjoin Defendants from prohibiting Plaintiffs from converting the modular
24 building to a radio broadcasting facility and operating the proposed Adventist radio ministry.
25
26

27 ¹¹² Deposition of Glen Toppenberg ("Toppenberg Depo."), 71:5-8. Relevant
28 portions of the exhibit are attached as Exhibit S to the Huie Decl.

1 **E. A PRELIMINARY INJUNCTION IS WARRANTED UNDER THE ALTERNATIVE TEST FOR**
2 **DETERMINING THE PROPRIETY OF A PRELIMINARY INJUNCTION.**

3 “By passing RLUIPA, Congress conclusively determined the national public policy that
4 religious land uses are to be guarded from interference by local governments to the maximum
5 extent permitted by the Constitution.”¹¹³ RLUIPA alone establishes that the public interest is
6 strongly in favor of granting a preliminary injunction to curb governmental land use regulations
7 that substantial burden the free exercise of religion.¹¹⁴

8 If the Court for any reason should find that Plaintiffs have not satisfied the traditional test
9 for determining the propriety of a preliminary injunction, Plaintiffs are entitled to application of
10 the “alternative test.”¹¹⁵ As discussed above, the balance of hardships and the public interest
11 strongly favor Plaintiffs. Thus, the factor of likelihood of success on the merits should be less
12 rigorously examined. Plaintiffs have raised serious questions about the merits of their case.
13 Under the alternative test, issuance of a preliminary injunction is appropriate.

14 **I V. CONCLUSION**

15 For the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion
16 and enjoin the County from preventing Plaintiffs’ conversion of the modular building into a radio
17 broadcasting facility and subsequent operation of a religious radio ministry as a church ministry
18 in such building.

19
20 Dated: January __, 2004

BASSI, MARTINI & BLUM LLP

21
22 By: _____
23 FRED M. BLUM
24 Attorneys for Plaintiffs

25
26 ¹¹³ Cottonwood, 218 F. Supp. 2d at 1230-31.

27 ¹¹⁴ Id. at 1231.

28 ¹¹⁵ Id. at 1217.