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**By Facsimile and First Class Mail**

October 10, 2006

Mayor and Town Council  
Town of Tiburon  
1505 Tiburon Boulevard  
Tiburon, CA 94920

**Re: Tiburon's Duty to Grant the Appeal of Congregation Kol  
Shofar under the Religious Land Use and Institutionalized  
Persons Act of 2000**

Dear Mayor Smith and Council Members:

We represent Congregation Kol Shofar in its appeal of the Tiburon Planning Commission's denial of Kol Shofar's conditional use permit application. We write to reiterate and amplify what Gary Ragghianti wrote you on September 6—that denying Kol Shofar's appeal would constitute a violation of both the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the United States and California Constitutions. If you deny the appeal, reduce the size of Kol Shofar's needed expansion, or impose onerous conditions of approval, you will open Tiburon to years of litigation, millions of dollars in damages and attorneys' fees, and the ignominy of being the only town in Marin County to place arbitrary limits on Jewish worship. Federal law—and prudence—demand that you approve Kol Shofar's permit application without additional restrictions.

We have also read and evaluated the letter from the synagogue's opponents dated October 3 and submitted in opposition to Kol Shofar's appeal. These opponents, of course, have no particular expertise with RLUIPA, and the town should pause before risking its reputation and its resources on their opinion. Indeed, an examination of their letter reveals that they apply the wrong standards to the wrong facts. Throughout their letter, the synagogue's opponents improperly attempt to place the burden of complying with RLUIPA on Kol Shofar instead of Tiburon. They fail to distinguish RLUIPA cases that have held bans on expansion to be substantial burdens. And they ignore the fact that the Planning Commission used the most restrictive means at its disposal to meet its stated interests—denying Kol Shofar's application outright. Finally, these opponents completely misunderstand the constitutional doctrines at issue here.

## **Becket Fund Experience With Religious Land Use Litigation**

Our assessment, and our decision to work on this case, is based on our involvement in most of the major religious land use decisions in recent years. The Becket Fund for Religious Liberty is an international, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. We litigate in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. In particular, we have been intensely involved in litigation under RLUIPA (and corresponding constitutional protections) involving discrimination or the burdening of religious exercise by local land use regulations and officials. We successfully represented the plaintiffs in the first case resolved under RLUIPA, *Haven Shores Community Church v. City of Grand Haven*, No. 1:00-CV-175 (W.D. Mich. 2000). Since then, we have brought successful suits under RLUIPA in courts in 12 states.<sup>1</sup>

In California, we recently successfully briefed and argued the companion cases of *Elsinore Christian Center v. City of Lake Elsinore*, 2006 WL 2456271 (9th Cir. Aug. 22, 2006) (mem.) and *Guru Nanak Sikh Society v. County of Sutter*, 456 F.2d 978 (9th Cir. Aug. 1, 2006). In addition, our clients in *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) received a multi-million dollar settlement after the district court issued an injunction against it for a RLUIPA violation. We also represent Redwood Christian Schools in its \$30 million lawsuit against Alameda County, currently scheduled to go to trial in February in San Francisco federal court. *Redwood Christian Schools v. County of Alameda*, Civ. No. 01-4282 (N.D. Cal.).

We've also been involved with a number RLUIPA matters specifically involving Jewish religious exercise. We have represented several different synagogues under RLUIPA, all of which resulted in favorable settlements for our clients. *See, e.g.*, Congregation Kol Ami in Pennsylvania (settled for six figures); Chabad of Key Biscayne in Florida (town utilized RLUIPA's safe harbor provisions); and Temple B'nai Shalom in Huntsville, Alabama (defendants agreed to bear costs of historic preservation). We have worked closely with the plaintiffs in *Westchester Day School v. Village of Mamaroneck*, 417 F.Supp.2d 477 (S.D.N.Y. 2006) (village violated RLUIPA by limiting Jewish school's expansion). Moreover, we have litigated prisoner claims for kosher prison food against Texas, Georgia and Florida under the "Institutionalized Persons" provisions of RLUIPA, as well as numerous other Jewish groups' claims based on constitutional civil rights. *See, e.g., Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d. 144 (3d Cir. 2002) (town ordinances banning *eruv* violated First Amendment).

We are forced to turn down over 99% of the RLUIPA inquiries we get, because there are so many. But we chose to become involved with this case because of the nature of the burden being placed on Kol Shofar—a denial of the only expansion requested by the only Jewish institution in Tiburon—and because this could be a good vehicle for demonstrating the scope of RLUIPA's protections, should the matter go to litigation.

We hope that litigation will not be necessary to vindicate Kol Shofar's rights. In that regard, the Council should keep in mind that, in our experience, this sort of dispute can involve millions of dollars

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<sup>1</sup> We also operate a website about RLUIPA at [www.rluipa.com](http://www.rluipa.com).

in damages for increased construction costs, financing costs, and attorneys' fees available under 42 U.S.C. § 1988. Another issue you will want to consider is that RLUIPA litigation, because it is so fact-intensive, typically forces decisionmakers like you to spend a lot of time, over a number of years, dealing with both litigation management and preparation for depositions and trial testimony.

Finally, given the circumstances here—especially the straitjacketing of the only Jewish house of worship in Tiburon—there is a distinct possibility that the Department of Justice would open an investigation into this case were it alerted to the problem. Department of Justice involvement almost always means additional fees and the entry of a federal consent decree. *See, e.g., Hale O Kaula Church v. Maui Planning Comm'n*, Civil No. 01-615 (D. Haw. 2004) (Becket Fund case with Department of Justice intervention in which Maui paid over \$700,000 in attorneys' fees in addition to those it paid its own counsel); *Hollywood Community Synagogue v. City of Hollywood, Fla.*, Case No. 04-61212-CIV (S.D. Fla. Jul. 7, 2006) (city settled RLUIPA lawsuit with Department of Justice by paying synagogue \$2 million and having staff and council members undergo RLUIPA training).<sup>2</sup>

### **Tiburon Must Follow and Apply Federal Law**

As a preliminary matter, it bears repeating that although—as Kol Shofar's opponents accurately state—RLUIPA has not abrogated land use planning law, where federal law and state law conflict, the Town must follow federal law. *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819) (federal law is “the supreme law of the land, ‘anything in the constitution or laws of any state to the contrary notwithstanding”). Tiburon's compliance or noncompliance with CEQA procedures and standards is therefore irrelevant to the question of whether it has met its affirmative obligation to follow RLUIPA and the Constitution. It may also help in this regard to remember that RLUIPA is a federal civil rights statute, just like the Civil Rights Act, the Voting Rights Act, or the Fair Housing Act. Just as Tiburon would not (and could not legally) comply with a state procedural or substantive standard that caused it to violate the Fair Housing Act, it cannot use CEQA or Town ordinances to trump RLUIPA or the Constitution. Local law yields to federal law, not vice versa.

### **RLUIPA Background**

The civil rights principles embodied in RLUIPA enjoy broad, bipartisan support. The legislation sailed virtually unopposed through both houses of an otherwise sharply divided Congress, and was signed into law by President Clinton on September 22, 2000. RLUIPA's remarkable success in the legislative process can be attributed to strong support from an exceptionally diverse coalition of religious and civil rights groups, ranging from the American Civil Liberties Union and People for the American Way to the National Association of Evangelicals and the Union of Orthodox Jewish

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<sup>2</sup> Kol Shofar's opponents erroneously state that the *Hollywood Community Synagogue* case has been appealed. Opponents' Letter, pp. 25-26 n.118. The appeals docket sheet attached as Exhibit 1 to the Opponents' Letter is actually an appeal of a denial of several synagogue neighbors' motion to intervene after the city had decided to settle. The city entered into a consent decree with the Department of Justice and an agreement with the synagogue, requiring it to pay \$2 million to the synagogue. Pursuant to the consent decree, councilmembers and staff must undergo RLUIPA training, the synagogue has an absolute right to build whatever it wants (subject to the fire code) on its property, the city cannot prevent the synagogue from acquiring and building what it wants on two adjacent parcels and the city will remain under the oversight of the Civil Rights Division for years to come.

Congregations of America.<sup>3</sup>

The requirements of RLUIPA are, for the most part, parallel to the protections provided by the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Thus, actions that violate RLUIPA are likely to violate the Constitution as well. RLUIPA has four main provisions:

- the “Substantial Burden” provision, which establishes that a local zoning regulation cannot substantially burden religious exercise unless that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1).<sup>4</sup>
- the “Nondiscrimination” provision, which forbids discrimination “on the basis of religion or religious denomination.” 42 U.S.C. § 2000cc(b)(2).
- the “Equal Terms” provision, which bans “treat[ing] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. 42 U.S.C. § 2000cc(b)(1).
- the “Exclusion and Limits” provision, which prohibits municipalities from “unreasonably limit[ing] religious assemblies, institutions, or structures within a jurisdiction.” 42 U.S.C. § 2000cc(b)(3).

Each of these provisions would be violated by a decision to deny Kol Shofar’s appeal or a decision to impose onerous conditions of approval, because Kol Shofar has applied for the minimum necessary to accommodate its current religious exercise.

### **Denying Kol Shofar’s Appeal Would Violate RLUIPA’s Substantial Burden Provision**

RLUIPA’s Substantial Burden provision provides in relevant part as follows:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

<sup>3</sup> The Ninth Circuit recently recognized that RLUIPA is a constitutional exercise of Congress’s authority in *Guru Nanak*. See also *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11<sup>th</sup> Cir. 2004). See also *Saints Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895 (7<sup>th</sup> Cir. 2005) (noting that RLUIPA is an “uncontroversial use” of Congress’s power to enforce the First and Fourteenth Amendments’ guarantee of free religious exercise).

<sup>4</sup> “The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7) (emphasis added). Moreover, “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” *Id.*

This provision reflects the Supreme Court’s conclusion, originally outlined in *Sherbert v. Verner*, 374 U.S. 398 (1963), and later reaffirmed in *Employment Div. v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that government-imposed burdens on religious exercise must be subjected to the strictest form of judicial scrutiny when they are imposed by systems of “individualized assessments.” In other words, pursuant to both the First Amendment and RLUIPA, strict scrutiny applies where burdens are applied on a discretionary, case-by-case basis, as is practically unavoidable in the zoning context.<sup>5</sup> Here it cannot be disputed that Tiburon makes decisions to grant or deny conditional use permits on a case-by-case basis.

A denial of Kol Shofar’s application to expand its place of religious assembly would substantially burden its ability to engage in fundamental religious activities. In its current facility, Kol Shofar is unable to carry out the precepts of Conservative Judaism, which require, among other things, meeting together for worship, studying Torah together, educating the young, sharing with the community, and doing good works. Specifically:

- **Forced to violate Jewish law on High Holy Days.** Reducing or eliminating the expansion of the Multi-Purpose Room would deny Kol Shofar the ability to meet together for worship as a group. Right now, because the available worship spaces are too small, Kol Shofar members are prevented from meeting together at one time for Rosh Hashanah and Yom Kippur worship, the holiest days of the Jewish religious year. Kol Shofar is currently forced to hold Rosh Hashanah and Yom Kippur morning worship services at 2 p.m., when these services must, under Jewish law, be over by 1 p.m. Moreover, one Kol Nidre service (the evening worship service on Yom Kippur) has to be scheduled after sunset, also in violation of Jewish Law. The specific size of the new Multi-Purpose Room was chosen so that Kol Shofar could accommodate approximately 700 people for High Holiday services—the minimum necessary to avoid dual services in violation of Jewish Law.<sup>6</sup>
- **Kol Shofar’s current religious activities must be held in woefully inadequate spaces.** Kol Shofar is forced to conduct over 20 religious activities of all sorts—which are currently crammed into spaces that are woefully inadequate. The following religious activities are all severely constrained, and will remain so, absent approval of the needed expansion:<sup>7</sup>
  - Neshama Minyan religious worship
  - Shabbat Family religious worship

<sup>5</sup> See, e.g., *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1221 (C.D. Cal. 2002).

<sup>6</sup> The late services on Rosh Hashanah and Yom Kippur also have to be shortened, making those who are forced to attend at those times second-class members. In addition, dual services place an enormous stress on the clergy as well as the lay leadership of Kol Shofar.

<sup>7</sup> It bears repeating that Kol Shofar seeks to expand its buildings to meet existing needs, not in anticipation of becoming a “mega-synagogue” as some of Kol Shofar’s opponents have claimed. Since all of these activities have been a part of the congregation’s religious exercise for years, it is hard to argue that continuing them—albeit in a space that can actually accommodate them—will increase traffic to the site. In fact, consolidating the two sets of High Holy Day services into one should decrease the amount of time that traffic is entering and exiting the site.

- Sunday religious school worship (with 250 children Kol Shofar needs at least two different rooms for worship)
- Shabbat spiritual movement and practice group
- Shabbat Friday evening Communal and family dinners
- Kiddush (post-worship collations and luncheons) on Shabbat and festival days
- Passover Seders
- Chanukah candle-lighting and communal dinners
- Yom Kippur communal break-the-fast meal
- Religious school assemblies
- Adult religious education classes (Kol Shofar has over 100 adults participating in adult classes and programs on Sundays and 50-75 adults on Wednesdays)
- Purim Schpiel (a religious holiday theatrical presentation with 350 people in attendance)
- Purim Carnival for children
- Ritual Fair for adults and children (200 adults and children participate in a 3 hour fair to learn how to do a variety of Jewish religious rituals)
- Bridges to Israel religious educational lectures (over 100 people in attendance once a month)
- Luncheons for Seniors
- Sunday Hot Lunch Program for the homeless

Most of these currently-existing religious activities would be held in the new Multi-Purpose Room. Since many of these programs go on simultaneously, the new Multi-Purpose Room has been designed to be divided so that they can go on at the same time without interference. In the current inadequate facilities, some of these programs end up interfering with one another. Moreover, the new Multi-Purpose Room can be divided so that more than one religious ceremony can occur at the same time. All of these features will enable Kol Shofar to meet the requirements of Conservative Judaism.

- **Kol Shofar cannot educate its members adequately.** A denial of the full space applied for would trap Kol Shofar in its current, inadequate facilities, inhibiting the religious education of its adults and children. This restriction limits Kol Shofar members' ability to comply with the command to study Jewish law. It also makes it harder for Kol Shofar members to live in accordance with Jewish law, or to pass their faith on to the next generation. Kol Shofar's current facilities greatly limit the number of adult education classes that can be held.
- **Kol Shofar cannot keep kosher without a new kosher kitchen.** The laws of Kashrut require that certain very detailed procedures be followed when preparing food. Among these are certain requirements regarding the separation between milk and meat, as well as ensuring that utensils are kept apart so that they remain kosher at all times. There are very specific rules about the separation distances required in a kitchen, which the current kitchenette cannot meet. As Conservative Jews, Kol Shofar members are required by their faith to keep kosher, so Kol Shofar uses this kitchenette for dairy items only. In many cases, this means that much of the Passover and Shabbat meals (which include meat) cannot be eaten. In some instances, food must be prepared in individual homes, which means that the food is not prepared under the necessary

rabbinical oversight. The planned new kitchen will provide the minimum separation distances necessary to allow meals to be prepared at Kol Shofar.

- **Bar and Bat Mitzvahs and Kiddush luncheons cannot be properly celebrated.** Kol Shofar hosts Bar and Bat Mitzvahs on approximately 30 Sabbaths a year, and usually has about 250-300 people in attendance at those services. Moreover, on Shabbat afternoons after worship Kol Shofar serves a kiddush luncheon. In the current social hall, this means that everyone must stand at the luncheon and, even so, the crowd spills out into the hallway or other rooms. Most importantly, there is little room for the elderly to sit down. The new Multi-Purpose Room allows space for all the attendees to sit down during the luncheon.
- **Kol Shofar members are prevented from celebrating weddings in their spiritual home.** Kol Shofar members celebrate about 8-10 weddings every year. Over the past ten years only five weddings have been held in the sanctuary, the religious home of the couples getting married. This is due to the current space restrictions, which means that no wedding dinner can be held in the social hall because the kitchenette is inadequate and there is not enough seating for guests. With the new Multi-Purpose Room Kol Shofar will be able to tell all of its engaged couples that they can be married in their own sanctuary and/or host their wedding reception in their own synagogue. Jewish halakhic literature states that a wedding meal is a “seudat mitzvah,” a meal of religious obligation, since it is a religious obligation for the community to rejoice with the bride and groom. *See* Seudat Mitzvah entry in the *Encyclopedia Judaica*.
- **Schedule restrictions enact a de facto ban on Saturday weddings and bar/bat mitzvahs.** Under the Jewish law governing Shabbat, set-up for receptions and other celebrations may not begin on Saturday evenings until 45 minutes after dark because it constitutes work. During May-September, Shabbat ends much too late for there to be any weddings or bar/bat mitzvah celebrations. During most of the remaining seven months of the year, set-up for celebrations may not begin until 7 p.m. Prohibiting all activity on the site after 9 p.m. thus makes any celebration completely untenable, and severely inhibits Kol Shofar’s ability to observe these religious celebrations.
- **Social outreach, including social aid, is inhibited by space and time restrictions.** Conservative Jews believe in serving the community they live in. But imposing onerous time and space restrictions interferes with Kol Shofar’s religious mission of communicating its message to the community, hosting community meetings and events, and engaging in social action programs in the community. Kol Shofar cannot share with others as freely as it would like because it is trapped in an inadequate, aging facility.

Forcing Kol Shofar to remain in the straitjacket of its current facilities does not allow its members to live out their lives in accordance with the truths of Judaism. They should not be substantially burdened by a government prohibition on expanding to accommodate their current religious exercise.<sup>8</sup> Since Kol Shofar has applied for the minimum space necessary to meet these

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<sup>8</sup> The synagogue’s opponents argue that Kol Shofar submitted no evidence concerning burden at the hearings and therefore cannot raise RLUIPA at this juncture. Opponents’ Letter at pp. 23-24. But RLUIPA does

religious needs, the Council must, under RLUIPA, approve the entire square footage applied for.

Courts have repeatedly found that denying the members of a religious body the ability to expand to meet the needs of that group constitutes a substantial burden on religious exercise. For example, a federal court held that a denial of a permit for expanding a Jewish school in a residential neighborhood “hinder[ed] and significantly interfer[ed] with the religious education and practice of current students,” finding a substantial burden violation under RLUIPA. *Westchester Day School v. Village of Mamaroneck*, 417 F.Supp.2d 477 (S.D.N.Y. 2006).<sup>9</sup> Notably, space constraints did not completely prevent the plaintiff from carrying out any religious activity at the site, but rather forced the school to curtail and to choose among its religious activities. *Id.* The same is true for Kol Shofar.

Similarly, *Living Water Church of God v. Charter Township of Meridian*, 384 F.Supp.2d 1123 (W.D. Mich. 2005), is indistinguishable from the situation here. In that case the trial court held that denying a CUP to expand a church’s Christian school substantially burdened religious exercise. That school, like Kol Shofar, was unable to adequately “practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff.” *Living Water*, 384 F.Supp.2d at 1333. As in *Westchester Day*, the plaintiffs were able to carry out some religious exercise on their property, but some of their religious exercise was substantially burdened. *Id.* Kol Shofar is also able to conduct some religious exercise now, but is now substantially burdened just as the church in *Living Water Church* was, and will remain so unless you approve what Kol Shofar has requested: the bare minimum, in both space and time, it needs to conduct its religious exercise.

The decision in *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F.Supp.2d 1203 (C.D. Cal. 2002), a case we litigated, is also instructive. There, the court found a substantial burden where the city refused to grant a CUP for a new church that was needed because the church had outgrown its existing facility. Like Kol Shofar, the inadequate size of the *Cottonwood* church impeded and prevented it from carrying out various religious activities. *Id.* at 1212. Just as space constraints prevented Cottonwood Christian from conducting outreach to potential new members, *id.* at 1212, Kol Shofar faces space constraints for current and incoming members and students. *Cf. Westchester Day*, 417 F.Supp.2d 494-95. Cottonwood Christian also faced difficulty in conducting its daycare ministry, its women’s ministries, and various adult classes. *Cottonwood*, 218 F.Supp.2d at 1212. Kol Shofar has faced similar difficulties, since lack of space inhibits its ability to provide religious educational classes

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not require the religious assembly or institution to submit evidence on burden as part of a CEQA process—the focus is on the result of the relevant land regulatory process. And we are unaware of any case holding that a civil rights plaintiff waived its rights under RLUIPA because it had failed to raise the claim before the government defendant rendered a final decision resulting in the burden. In any case, there is in fact evidence in the record about why Kol Shofar needs to expand. Moreover, if the Council requires more information about the burden on Kol Shofar’s religious exercise were no permit to be granted, Kol Shofar is willing to provide further affidavits and other testimony about such burdens.

<sup>9</sup> Kol Shofar’s opponents claim that the *Westchester Day* decision “has been appealed to the First Circuit . . . .” Opponents’ Letter, pp. 25-26 n. 118. Aside from the fact that the *Westchester Day* appeal is to the *Second* Circuit, not the First Circuit, this point betrays a lack of understanding of the federal appellate system. Federal courts of appeals do not have discretionary appellate jurisdiction—they must hear every appeal, no matter how frivolous. The *Westchester Day* decision is thus good precedent, and something you should take into account.

and counseling for its members and students. *Cf. Westchester Day*, 417 F.Supp.2d 490-94. Thus, the burden here is at least as “substantial” as that in *Cottonwood* and *Westchester Day*.

Numerous other courts have likewise found a substantial burden where the government denied a zoning permit that prevented religious exercise at a particular piece of property:

- *DiLaura v. Ann Arbor Charter Township*, 30 Fed. Appx. 501 (6th Cir. 2002): Finding a substantial burden under RLUIPA where the town denied a variance to allow the plaintiffs to use a particular property in the township as a religious retreat center. The Court held that preventing “gatherings of individuals for the purposes of prayer (the activity [sought by the religious landowner]) is a use of land constituting a religious exercise that is substantially burdened.” *Id.* at 509. Notably, the Court held that the burden existed even though the plaintiff had the option of applying for a CUP after the variance was denied.
- *Church of the Hills v. Township of Bedminster*, 2006 WL 462674 (D.N.J. Feb. 24, 2006): Allowing RLUIPA substantial burden claim to go forward where variance denial prevented church from meeting together as a body, participating in necessary ministries, and being accessible to its congregation.
- *Castle Hills First Baptist Church v. Castle Hills*, 2004 WL 546792 (W.D.Tex. 2004): Denying city’s motion for summary judgment on substantial burden claim, where city refused to accept and grant zoning permit application to use existing church property for its religious school.
- *Hale O Kaula v. Maui Planning Comm’n*, 229 F.Supp.2d 1056 (D.Haw. 2002): Allowing RLUIPA substantial burden claim to go forward where county denied church SUP to expand building to allow needed religious activities.
- *Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083 (C.D.Cal. 2003): Finding substantial burden where city denied a CUP to allow church to move from existing inadequate facility to a new property. The Ninth Circuit affirmed this part of the district court’s opinion, but reversed its ruling that RLUIPA was unconstitutional. *See Elsinore Christian Center v. City of Lake Elsinore*, 2006 WL 2456271 (9th Cir. Aug. 22, 2006) (mem.)
- *Greater Bible Way Temple v. Jackson*, 2005 WL 3036527 (Mich.App. 2005): Finding substantial burden where the city prohibited the church from adding a ministry building for the elderly and disabled near existing church property.
- *Shepherd Montessori v. Ann Arbor*, 675 N.W.2d 271 (Mich.App. 2003): Allowing substantial burden claim to go forward where township denied variance to allow plaintiff to operate religious school adjacent to religious daycare.

- *Jesus Center v. Farmington Hills*, 544 N.W.2d 698, 703–704 (Mich.App. 1996): Finding substantial burden in denial of application to run a homeless shelter on church property where that action “flow[ed] from [] religious beliefs and [was] an exercise of those beliefs.”
- *Alpine Christian Fellowship v. County Comm’rs*, 870 F. Supp. 991, 994 (D.Colo. 1994): Finding substantial burden under Free Exercise Clause where County denied a SUP to allow church to operate a religious school on its property. *Id.* (“[g]iven the importance of religious education to...the Church, the importance of conducting the school within the church building is self evident.”)
- *First Covenant Church v. Seattle*, 840 P.2d 174 (Wash. 1992): Finding substantial burden under Free Exercise Clause where landmarking law imposed severe financial burdens upon the church and prohibited alteration of the church building.

These examples bear out what Judge Posner emphasized in the leading Seventh Circuit RLUIPA land use case: burdens on religious exercise need not be “insuperable” to be “substantial” under RLUIPA. *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900-901 (7th Cir. 2005). Even “delay, uncertainty, and expense” can constitute a substantial burden. *Id.*

Although the Ninth Circuit has not ruled directly on a RLUIPA expansion case, in *Guru Nanak* it cited both *Westchester Day* and *Living Water Church* with favor, agreeing that the governmental limits on expansion in those cases constituted substantial burdens.<sup>10</sup> *Guru*, 456 F.3d at 991. *Guru* also noted that courts should also look to the religious plaintiff’s history of planning applications, as well as its prospects for future ability to exercise its beliefs within the jurisdiction. During the 22 years it has worshipped in Tiburon, Kol Shofar has never asked for permission to expand, even as its membership grew. In its only request, Kol Shofar designed its expansion to have minimal impacts on others, and throughout the process has offered alternatives and options for moving forward in response to the concerns expressed. In fact, Kol Shofar has asked for the minimum necessary to meet its religious needs. Like the temple in *Guru*, it also agreed to all of the mitigation measures set forth in the EIR. The Planning Commission’s response was to deny the permit outright, finding that **no** mitigation was possible. Under Tiburon’s Zoning Ordinance, this means Kol Shofar will be stuck in its aging, unrenovated facility for at least a year before it can apply for another permit. Tiburon Zoning Ordinance § 16-4.4.14. And since “the reasons given for the reasons given for ultimately denying these applications” won’t change in future years, Tiburon has already “to a significantly great extent lessened the possibility that future CUP applications would be successful.” *Guru*, 456 F.3d at 989 (citing *Saints Constantine & Helen*, 396 F.3d at 899-900). Nor is there any other site in Tiburon, or for that matter in southern Marin County, where Kol Shofar could be expected to move.

Throughout their letter, Kol Shofar’s opponents state—erroneously—that because Kol Shofar did

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<sup>10</sup> Kol Shofar’s opponents, apparently in an effort to disparage its holdings, dub *Westchester Day* an “East Coast” opinion, Opponents’ Letter at p.25. Since the Ninth Circuit directly relied on *Westchester Day* in *Guru*, it is relevant to your determination, regardless of the coast it’s on.

not agree to a stipulation on mitigating conditions, it cannot complain under RLUIPA. This is a red herring. Zoning proceedings are not contractual negotiations where the government haggles with the applicant in an effort to reach a deal. They are regulatory proceedings where the government must fairly apply pre-existing rules to an applicant. The Planning Commission's final decision on Kol Shofar's application was not conditional approval, it was complete denial—no renovation, no expansion, and no ability for its members to hold bar and bat mitzvahs and weddings. If this dispute ends up in federal court, the judge will not be evaluating what might have been if Kol Shofar had been coerced into a stipulation, she will be evaluating the effects and fairness of the complete denial of the permit application.

Moreover, contrary to Kol Shofar's opponents' assertions, Kol Shofar attempted to accommodate neighbors' concerns, and even submitted multiple alternative designs. *See, e.g.*, FEIR 3. Like the Sikh temple in *Guru*, the Jewish day school in *Westchester Day*, and the church in *Living Waters Church*, Kol Shofar cooperated with planning staff throughout. Of course this cooperation need not be so absolute that the religious plaintiff has to give up its religious exercise in order to cooperate with the implacable demands of neighbors. *See Guru*, 456 F.3d at 991 n.19 (temple's "predicament" caused by neighbor sentiment that "[N]o family wants to live near a religious temple with all the excessive crowds, traffic, and noise").

The overwhelming weight of authority under RLUIPA thus demonstrates that Kol Shofar's religious exercise is substantially burdened by the Planning Commission's absolute refusal to allow it to renovate and expand its building, or to meet together for worship and other religious ceremonies. Moreover, on these facts, any limitation you might impose, even if it is short of full denial, would also violate the law. Kol Shofar's application is for the minimum necessary to enable to conduct the religious exercise Conservative Judaism requires it to do. Attempting to reduce that irreducible minimum would create just as much a substantial burden as the Planning Commission's outright denial.

### **The Town's Asserted Interests Do Not Justify Denial of Kol Shofar's Application**

We are not aware of any interests that the Town might have sufficient to impose such substantial burdens on the applicant's religious exercise. RLUIPA and the First Amendment provide that the state may only substantially burden religious exercise when the imposition of such burden is the least restrictive means of furthering a compelling government interest. *See* 42 U.S.C. § 2000cc. Courts have repeatedly held that "in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). Courts scrupulously follow the Supreme Court's instruction to classify only "paramount interests" of "the highest order" as worthy of burdening religious exercise.<sup>11</sup> Compelling interests are the kinds of interests that allow governments to discriminate among races, suppress speech, or sterilize people. *See*,

<sup>11</sup> *See Sherbert*, 374 U.S. at 40 (protecting public safety and order); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (avoiding disclosure of sensitive governmental information); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) (railway safety); *U.S. v. Lee*, 455 U.S. 252, 260 (1982) (compulsory participation in the Social Security system); *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9<sup>th</sup> Cir. 2005) (prison security a compelling government interest under RLUIPA).

e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Texas v. Johnson*, 491 U.S. 397 (1989); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).<sup>12</sup>

From our review of the record, we understand that the Planning Commission based its denial on noise, traffic, headlight intrusion, and compatibility with the neighborhood. However, courts have repeatedly concluded that noise, traffic, and aesthetics, though legitimate concerns for a municipality, do not meet the high threshold of a “compelling” government interest.<sup>13</sup> Nor does the bare assertion by the

<sup>12</sup> In the land use context, compelling interests have been described as those in preventing “a clear and present, grave and immediate danger to public health, peace and welfare,” *First Covenant Church of Seattle v. Seattle*, 840 P.2d 174, 187 (Wash. 1992), such as fire safety and occupancy limits. See, e.g., *Antrim Faith Baptist Church v. Commonwealth*, 460 A.2d 1228, 1230 (Pa.Cmwlt. 1983).

<sup>13</sup> See, e.g., *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8<sup>th</sup> Cir. 1995) (“[A] municipality’s asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling.”); *Curry v. Prince George’s County, Md.*, 33 F. Supp. 2d 447, 452 (D. Md. 1999) (“Again, while recognizing aesthetics and traffic safety to be ‘significant government interests,’ none of these courts found those interests sufficiently compelling to pass the applicable strict scrutiny test.”); *McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1325 n.2 (D.N.J.1994) (“[N]o court has ever held that [aesthetics and traffic safety] form a compelling justification for a content-based restriction on political speech”); *Village of Schaumburg v. Jeep Eagle Sales Corp.*, 676 N.E.2d 200, 204 (Ill. App. 1996) (finding that “[t]raffic safety and visual aesthetics are not the sort of compelling state interest required to justify a content-based restriction on expression”); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9<sup>th</sup> Cir. 1988) (“interests in traffic safety and aesthetics, while ‘substantial,’ fell shy of ‘compelling.’”); *Loftus v. Township of Lawrence Park*, 764 F. Supp. 354, 361 (W.D. Pa. 1991) (“we doubt that aesthetics or residential quietude is sufficiently compelling to ever justify a content-based restriction . . . on freedom of expression”); *Love Church v. Evanston*, 671 F. Supp. 515, 519 (N.D. Ill. 1987), *vacated based on standing*, 896 F.2d 1082 (7<sup>th</sup> Cir. 1990) (“While traffic concerns are legitimate, we could hardly call them compelling.”); *American Friends of Soc’y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y.A.D. 1979) (“[C]onsiderations of the surrounding area and potential traffic hazards . . . are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community.”); *State ex rel. Tampa Company of Jehovah’s Witnesses, etc. v. Tampa*, 48 So. 2d 78, 79 (Fla. 1950) (“The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the week and this at hours when traffic is at its lightest.”); *New Hope Baptist Church v. City of Hackensack*, No. L-2873-03, at 35-36 (Super. Ct., Bergen Co. N.J. Oct. 22, 2003) (asserted interests concerning traffic and parking - as a basis for denying church permit - are not compelling under RLUIPA); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569-70 (11<sup>th</sup> Cir. 1993) (holding that “interest[] in aesthetics . . . is not a compelling government interest”); *XXL of Ohio, Inc. Commerce v. City of Broadview Heights*, 341 F.Supp.2d 765, 789-90 (N.D. Ohio 2004) (internal citations omitted) (rejecting “aesthetics” and protection of “neighborhood character” as a compelling government interest); *Castle Hills*, 2004 WL 546792, at \*16 (W.D. Tex. 2004) (preserving neighborhood privacy concerns not a compelling government interest); *Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272 F.Supp.2d 671, 685 (N.D. Ohio 2003) (interest in protecting residents’ privacy did not rise to the level of compelling interest); *Cottonwood*, 218 F. Supp. 2d at 1227-28 (purely aesthetic harms, such as the elimination of blight, are not compelling); *King Enterprises, Inc. v. Thomas Township*, 2002 WL 1677687, at \*18 (E.D. Mich. 2002) (“Although ‘safety’ and ‘aesthetics’ are substantial government interests, they are not compelling . . . .”); *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 41 (Wash. 2000) (furthering “aesthetic and cultural interests” is not a compelling interest); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (holding that such important interests as safeguarding the heritage of a city and fostering civic beauty are not compelling); *Alpine Christian Fellowship*, 870 F. Supp. at 994 (holding that avoiding additional “noise impacts” of religious school not a compelling interest); *Society of Jesus v.*

Planning Commission or Kol Shofar opponents that Kol Shofar's expansion would be incompatible with the surrounding residential neighborhood provide a sufficient reason to substantially burden the Congregation's religious exercise. Under *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1220 (2006), this sort of "mere invocation" of broadly defined interests "cannot carry the day." *Id.*, 126 S. Ct. at 1221. See also *Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225, 1239 (E.D. Va. 1996) ("compatibility of land uses" would not be a compelling government interest sufficient to support racial classifications, so it cannot support "a substantial burden on the free exercise of religion.")<sup>14</sup> Not a single court has ever held that such aesthetic concerns constitute a compelling government interest. Again, we direct your attention to the recent *Westchester Day School* case which held that asserted "traffic, parking, aesthetics, drainage and public concern[s] . . . do not bear the necessary substantial relation to public health safety or welfare." 417 F.Supp.2d at 564.

The record also reveals that the Planning Commission's proffered reasons were dubious at best (for example, comparing project maximum noise levels to ambient background noise levels rather than pre-existing maximum noise levels). The worst example is the Planning Commission's bootstrapping of **one** observed turnaround "adjacent to a residential driveway" (FEIR 27) into "unsafe turnarounds" that endangered children. Tiburon Planning Commission, Res. No. 2006-16, p. 14. There are many other examples that would be probed fully in discovery and before a jury. By openly putting its thumb on the scales and making findings additional to and different than those in the EIR based on the flimsiest of evidence, the Planning Commission demonstrated bias against Kol Shofar, or at the very least an attempt to bullet-proof a decision it had already determined to make.

In addition, there are a myriad of ways to address legitimate concerns absent a flat refusal to permit Kol Shofar to expand its use for religious assembly under any circumstances. For example, the mitigation measures described in the EIR would be less restrictive means than denying Kol Shofar the space and time it needs. Refusing Kol Shofar's request—already at the bare minimum necessary—would certainly not be considered the "least restrictive means" of achieving a proffered compelling interest. Accordingly, a denial of Kol Shofar's application would violate RLUIPA's Substantial Burdens provision.

### **Denying Kol Shofar's Application Would Violate RLUIPA's Non-Discrimination Provision**

RLUIPA's non-discrimination provision provides that "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). Every house of worship in Tiburon

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*Boston Landmarks Comm.*, 564 N.E. 2d 571, 574 (Mass. 1990) ("The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance."). See also *Congregation Comm. v. City Council of Haltom City*, 287 S.W.2d 700, 704-05 (Tex. Civ. App. 1956) ("Neither is mere inconvenience to neighbors . . . a valid reason to deny a church the right to exist in a residential district. It is hard to visualize a church being constructed in a residential district without inconveniencing someone. To restrict churches to areas where no one will be inconvenienced would be, in effect, excluding churches from residential districts.").

<sup>14</sup> See also *Kikumura v. Hurley*, 242 F.3d 950, 962 (10<sup>th</sup> Cir. 2001) ("[A] court does not consider the [policy] in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the [policy] to the individual claimant.").

(other than Kol Shofar) is Christian,<sup>15</sup> but those houses of worship have not been subjected to the same procedure, or the same standards, as Kol Shofar. To deny Kol Shofar's application for its first expansion ever during the 22 years it has been in Tiburon, while Christian churches are allowed to expand at will creates a *prima facie* Non-Discrimination claim under RLUIPA. This is especially so because the Planning Commission's decision was in part based on "incompatibility" with the neighborhood.

The prime example of this discrimination is the comparison with the expansion of St. Hilary's, approved only a few years ago. A federal jury would need to determine whether Kol Shofar had been treated worse than St. Hilary's, which is located in the same RO-1 zone, and judged by the same CUP standards, but was allowed to build both a new gymnasium and an additional expansion of 25,000 square feet. Since St. Hilary's was allowed to renovate and expand, but Kol Shofar was not, a reasonable jury would have little choice but to find that Tiburon violated RLUIPA by discriminating against Kol Shofar. In their letter, the synagogue's opponents argue that the St. Hilary's expansion was different, but of course that would be for the trier of fact to decide, in this case a federal jury.<sup>16</sup>

### **Denying Kol Shofar's Application Would Violate RLUIPA's Equal Terms Provision**

RLUIPA's Equal Terms provision bans "treat[ing] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. 42 U.S.C. § 2000cc(b)(1). RLUIPA thus mandates that religious institutions can be treated **no worse than any nonreligious assembly** under zoning law.

Here, it is clear that some nonreligious assemblies within Tiburon's jurisdiction have been treated on better terms than Kol Shofar. For example, Tiburon has granted CUPs to both the Tiburon Peninsula Club and the Lodge at Tiburon to increase their square footage, but has not forced either to go through the same EIR procedures or meet the same standards that were imposed on Kol Shofar. Other assemblies were granted CUPs long ago or were never subjected to the CUP process or its standards. These places of assembly include the Richardson Bay Audubon Center and Tiburon's Town Hall. Federal litigation of Kol Shofar's Equal Terms claim would focus on whether Tiburon applied the same exacting procedures and standards to those entities as it has to Kol Shofar. Since it hasn't, Tiburon will commit a RLUIPA violation if the Planning Commission's decision is allowed to stand.<sup>17</sup>

### **Denying Kol Shofar's Application Would Violate Both the Federal and California Constitutions**

For the same reasons it violates RLUIPA, the Planning Commission's decision also violates Kol

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<sup>15</sup> RLUIPA comparators would include St. Hilary's Catholic Church, Community Congregational Church, Shepherd of the Hills Lutheran Church, and Tiburon Baptist Church.

<sup>16</sup> Since other churches in Tiburon were also allowed to undertake major renovations without undergoing the EIR process, their approval processes and the standards applied by Tiburon would also need to be explored in RLUIPA litigation.

<sup>17</sup> For the same reasons, this discrimination in favor of non-religious assemblies would violate RLUIPA's Exclusions and Limits section, because it "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3).

Shofar's (and its members') rights to freedom of speech, freedom of association, and freedom of religion under the United States Constitution, and the even broader protections of California Constitution, Article 1, Sections 1-4. For example, by preventing Kol Shofar's members from assembling together for worship, Tiburon is violating their First Amendment right to assemble and associate with one another.

It is worth briefly pointing out that, in their letter, Kol Shofar's opponents completely misunderstand one of the First Amendment counts that would be available to Kol Shofar in a federal lawsuit. The "unbridled discretion" doctrine has nothing at all to do with whether the Planning Commission was meticulous or not; it has everything to do with whether the Town's ordinances give the Planning Commission too much leeway in making decisions that affect First Amendment rights. Ordinances "must avoid placing unbridled discretion in the hands of government officials." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082 (9th Cir. 2006) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990)). In *FW/PBS*, the Supreme Court reiterated its well-settled unbridled discretion jurisprudence as follows:

[A]n ordinance which...makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official –as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

*FW/PBS, Inc.*, 493 U.S. at 225-26. To withstand a constitutional challenge, the ordinance must provide "narrow, objective, and definite standards to guide the licensing authority." *Kreisner v. City of San Diego*, 1 F.3d 775, 805 (9th Cir. 1993).

Tiburon's zoning ordinances make Kol Shofar's "peaceful enjoyment" of its First Amendment rights "contingent upon the uncontrolled will" of the Planning Commission (and this Council) by failing to provide "narrow, objective, and definite standards" to guide either body. Tiburon's Zoning Ordinance includes broad, subjective, and indefinite standards such as "properly related to the development of the neighborhood as a whole" "reasonably compatible with the types of uses normally permitted in the surrounding area"; "adequate facilities and services required for such use"; "reasonably assure that the basic purposes of this chapter and the objectives of the general plan would be served"; and "whether the town is adequately served by similar uses." Tiburon Zoning Ordinance § 16-4.4.2. Each of these "standards" is in eye of the beholder. Since that beholder is the Planning Commission, Tiburon has given unbridled discretion to governmental officials over Kol Shofar's First Amendment rights.

### **The Town Council Can Take Advantage of RLUIPA's Safe Harbor Provision**

RLUIPA grants municipalities discretion, via a safe harbor provision, to take measures to avoid applying their land use ordinances in such a way as to violate the Act. Specifically, Section 5(e) of RLUIPA provides:

Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of [RLUIPA] by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the

policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

42 U.S.C. 2000cc-5(e) (emphasis added).

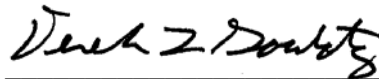
Here, the Council may take advantage of this safe harbor provision—and avoid the violations of RLUIPA discussed above—by using its discretion to lift the burden on Kol Shofar’s religious exercise and approve the Congregation’s application for a conditional use permit.<sup>18</sup> Again, complying with federal law would trump any claims based on state laws like CEQA.

**Conclusion**

We urge the Council to approve Kol Shofar’s permit application. It’s not only the law, it’s also what’s fair. We welcome any inquiries.

Sincerely,

The Becket Fund for Religious Liberty



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Gary Ragghianti, Esq.

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<sup>18</sup> The Council could, for example, approve Alternative 7 as one method of taking advantage of the RLUIPA safe harbor, since Alternative 7 provides Kol Shofar with the minimum amounts of time and space needed to meet its religious requirements.