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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
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7 NEW HARVEST CHRISTIAN  
8 FELLOWSHIP,

9 Plaintiff,

10 v.

11 CITY OF SALINAS,

12 Defendant.  
13  
14

Case No. 19-cv-00334-SVK

**ORDER ON (1) MOTION FOR  
SUMMARY JUDGMENT OF  
DEFENDANT CITY OF SALINAS;  
(2) MOTION FOR SUMMARY  
JUDGMENT OF PLAINTIFF NEW  
HARVEST CHRISTIAN  
FELLOWSHIP; AND (3) REQUEST  
FOR JUDICIAL NOTICE OF  
PLAINTIFF NEW HARVEST  
CHRISTIAN FELLOWSHIP**

Re: Dkt. Nos. 28, 35, 41

15 Plaintiff New Harvest Christian Fellowship (“New Harvest”) challenges zoning decisions  
16 by Defendant City of Salinas (“Salinas” or “the City”) that New Harvest claims affect its ability to  
17 conduct a religious assembly on the ground floor of a building it purchased located at 344 Main  
18 Street in downtown Salinas (the “Beverly Building”). New Harvest alleges that the City’s zoning  
19 code and denial of New Harvest’s proposed use of the Beverly Building treat New Harvest on less  
20 than equal terms with nonreligious assemblies and substantially burden religious exercise, in  
21 violation of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C.  
22 § 2000cc et seq. Dkt. 1 at ¶¶ 53-63. The parties have consented to the jurisdiction of a magistrate  
23 judge. Dkt. 6, 12.

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

1 **I. BACKGROUND**

2 The City’s zoning code specifies a “Central City Overlay” district and, within that, a  
3 “Downtown Core Area.” Dkt. 28-5 (Hunter Decl.) at ¶ 4 and Ex. C. Most of the Downtown Core  
4 Area is classified as “mixed use.” Id. However, in 2006, the City amended its zoning code to  
5 include a prohibition on “[c]lubs, lodges, places of religious assembly, and similar assembly uses”  
6 on the ground floor of buildings facing Main Street in the 100 to 300 blocks of Main Street. Id. at  
7 ¶ 5 and Ex. C at 4 (Section 37-40.310(a)(2)). This three-block area lies within the larger  
8 Downtown Core Area. Id. at ¶ 4. For purposes of this order, the Court will refer to this zoning  
9 restriction as the “assembly uses provision” and will refer to the 100 to 300 blocks of Main Street  
10 as the “Main Street restricted area.”

11 According to the City, the purpose of the assembly uses provision is “to stimulate  
12 commercial activity within the City’s downtown, which had been in a state of decline, and to  
13 establish a pedestrian-friendly, active and vibrant Main Street.” Id. at ¶ 5. Aside from “normal  
14 [Conditional Use Permit] requirements,” there is no restriction on assembly uses in the Downtown  
15 Core Area outside the three blocks of the Main Street restricted area, and there is no prohibition on  
16 assembly uses within the Main Street restricted area above the ground floor. Id.

17 New Harvest is part of a consortium of churches called New Harvest that is “like a  
18 denomination, but without a hierarchy of leadership” and has “beliefs [that] fall within the general  
19 stream of conservative, Evangelical, Pentecostal doctrine.” Dkt. 36 (Torres Decl.) at ¶ 2. New  
20 Harvest currently operates from a rented facility in downtown Salinas located at 357 Main Street  
21 under a conditional use permit (“CUP”) issued in 1994. Id. at ¶ 17; Dkt. 28-5 at ¶ 3. The CUP has  
22 been extended twice; the second extension was a three-year extension granted in June 2000. Dkt.  
23 28-5 at ¶ 3. At the time of the last CUP extension, New Harvest told the City it did not intend to  
24 occupy 357 Main on a long-term basis, expected to be at the location for up to an additional three  
25 years, and was hoping to either buy a permanent building or build elsewhere. Id. at ¶ 3 and Ex. B  
26 at 2. Nevertheless, New Harvest has since continued to use the building at 357 Main Street as a  
27 “legal nonconforming use.” Id. at ¶ 3.

28 New Harvest’s weekly schedule of activities includes a Sunday morning worship service

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

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

## 19 **II. LEGAL STANDARD**

20 Summary judgment is appropriate if the moving party shows that there is no genuine  
21 dispute as to any material fact and the party is entitled to judgment as a matter of law. Fed. R.  
22 Civ. P. 56(a). A fact is material if it may affect the outcome of the case. *Anderson v. Liberty*  
23 *Lobby, Inc.*, 477 U.S. 242, 248 (1985). A genuine dispute of material fact exists if there is  
24 sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

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

1           Where the party moving for summary judgment has the burden of persuasion at trial, such  
2 as where the moving party seeks summary judgment on its own claims or defenses, the moving  
3 party must establish “beyond controversy every essential element of its [claim].” *So. Cal. Gas Co.*  
4 *v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (citation omitted). Where the moving  
5 party seeks summary judgment on a claim or defense on which the opposing party bears the  
6 burden of persuasion at trial, “the moving party must either produce evidence negating an essential  
7 element of the nonmoving party’s claim or defense or show that the nonmoving party does not  
8 have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.”  
9 *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the  
10 moving party meets its initial burden, the burden shifts to the nonmoving party to produce  
11 evidence supporting its claims or defenses. *Id.* at 1103. If the nonmoving party does not produce  
12 evidence to show a genuine issue of material fact, the moving party is entitled to summary  
13 judgment. *Celotex*, 477 U.S. at 323.

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

### 23 **III. EVIDENTIARY ISSUES**

#### 24 **A. Evidentiary objections**

##### 25 **1. New Harvest’s objections**

26           New Harvest filed objections to the Declarations of Megan Hunter and Gregory R. Aker,  
27 which were submitted by the City in support of its summary judgment motion, under Federal Rule  
28 of Evidence 408 on the grounds that selected portions of those declarations refer to settlement

1 discussions. Dkt. 46. The evidence to which New Harvest objects concerns discussions between  
2 the City and New Harvest regarding possible modifications to the Beverly Building that would  
3 place commercial pedestrian-oriented activities on the ground floor facing Main Street and allow  
4 the church to hold worship services at the back portion of the ground floor. Id.<sup>1</sup>

5 New Harvest's evidentiary objections are **OVERRULED** on both procedural and  
6 substantive grounds. First, Civil Local Rule 7-3(a) requires that "[a]ny evidentiary and procedural  
7 objections to [a] motion must be contained within the [opposition] brief or memorandum." New  
8 Harvest's filing of a separate document containing evidentiary objections is in violation of this  
9 Civil Local Rule. Second, Federal Rule of Evidence 408, upon which New Harvest relies, states  
10 that evidence of settlement negotiations is not admissible "either to prove or disprove the validity  
11 or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction"  
12 but "[t]he court may admit this evidence for another purpose." Therefore, even assuming that the  
13 evidence to which New Harvest objects relates to settlement negotiations between the parties, the  
14 Court may consider that evidence for purposes other than the validity or amount of New Harvest's  
15 claim or as impeachment. Nevertheless, the evidence of alleged discussions between the City and  
16 New Harvest regarding possible modifications to New Harvest's proposed use of Beverly  
17 Building is not material to the Court's analysis of New Harvest's RLUIPA claims.

## 18 2. The City's objections

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

26 The City's objection to Mr. Burgess's declaration is **OVERRULED**. Although Mr.

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27  
28 <sup>1</sup> New Harvest's opposition to the City's summary judgment motion addresses this evidence notwithstanding the evidentiary objections. See Dkt. 45 at 6-7.

1 Burgess cannot testify as an expert in this case due to New Harvest's failure to disclose him, the  
 2 declaration provides adequate foundation for the Court to consider Mr. Burgess as a fact witness  
 3 concerning the current availability of other properties in Salinas.

4 **B. Plaintiff's Request for Judicial Notice**

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

7 The Court may judicially notice a fact that "is not subject to reasonable dispute because it:  
 8 (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and  
 9 readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid.  
 10 201(b); *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993).

11 New Harvest seeks judicial notice of the articles of incorporation of Ariel Theatre. Dkt. 41  
 12 at 2. Articles of incorporation are subject to judicial notice. *In re Yahoo! Inc. Shareholder Deriv.*  
 13 *Litig.*, 153 F. Supp. 3d 1107, 1117 (N.D. Cal. 2015). The remaining items in New Harvest's  
 14 request for judicial notice are portions of the Salinas Zoning Code. Dkt. 41 at 2. Municipal  
 15 ordinances are proper subjects of judicial notice. *Tollis Inc. v. City of San Diego*, 505 F.3d 935,  
 16 938 n.1 (9th Cir. 2007).

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

19 **IV. DISCUSSION**

20 RLUIPA was enacted "to protect the free exercise of religion guaranteed by the First  
 21 Amendment from government regulation." *Guru Nanak Sikh Soc. Of Yuba County v. County of*  
 22 *Sutter*, 456 F.3d 978, 985 (9th Cir. 2006). RLUIPA contains several provisions limiting  
 23 government regulation of land use, referred to as: (1) the substantial burden provision, (2) the  
 24 equal terms provision, (3) the nondiscrimination provision, and (4) the exclusions and limits  
 25 provision. See 42 U.S.C. § 2000cc; *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*,  
 26 651 F.3d 1163, 1169 and n.24 (9th Cir. 2011). In this case, New Harvest asserts claims under  
 27 RLUIPA's substantial burden and equal terms provisions. Dkt. 1 at ¶¶ 53-63. Each party seeks  
 28 summary judgment on both of New Harvest's RLUIPA claims and agrees that this case can

1 properly be resolved on summary judgment. Dkt. 28, 35.

2 **A. Substantial Burden Claim**

3 A government land use regulation that imposes a substantial burden on the religious  
4 exercise of a religious assembly or institution is unlawful under RLUIPA “unless the government  
5 demonstrates that imposition of the burden ... is in furtherance of a compelling government  
6 interest; and is the least restrictive means of furthering that compelling government interest.” *Int’l*  
7 *Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011)  
8 (quoting 42 U.S.C. § 2000cc(a)(1)). The plaintiff bears the burden of persuasion as to whether the  
9 City zoning ordinance, or the City’s application of that ordinance to the plaintiff, “substantially  
10 burdens” the plaintiff’s exercise of religion. *San Jose Christian College v. City of Morgan Hill*,  
11 360 F.3d 1024, 1034 (9th Cir. 2004). Even if the plaintiff establishes a prima facie case of  
12 violation of RLUIPA such that the burden shifts to the government, the burden of establishing  
13 “substantial burden” remains with the plaintiff. *Centro Familiar*, 651 F.3d at 1171 (citing 42  
14 U.S.C. § 2000cc-2(b)).

15 The City does not dispute that New Harvest is a religious assembly or institution. See  
16 Dkt. 28. RLUIPA provides that “[t]he use, building, or conversion of real property for the purpose  
17 of religious exercise shall be considered to be religious exercise of the person or entity that uses or  
18 intends to use the property for that purpose.” 42 U.S.C. § 2000cc-5(7)(B). The activities that  
19 New Harvest seeks to conduct at the Beverly Building include religious assemblies. See Ex. F to  
20 Dkt. 28-5 at 1. Such activities constitute a “religious exercise” within the meaning of RLUIPA’s  
21 substantial burden provision. See 42 U.S.C. § 2000cc-5(7)(A) (defining “religious exercise” to  
22 include “any exercise of religion, whether or not compelled by, or central to, a system of religious  
23 belief”).

24 The Court next considers whether the City’s zoning decisions have imposed a substantial  
25 burden on the religious exercise of New Harvest. The Court’s analysis under the substantial  
26 burden provision “proceeds in two sequential steps.” *Foursquare Gospel*, 673 F.3d at 1066.  
27 “First, the plaintiff must demonstrate that a government action has imposed a substantial burden  
28 on the plaintiff’s religious exercise.” *Id.* “Second, once a plaintiff has shown a substantial burden,

1 the government must show that its action was ‘the least restrictive means’ of ‘further[ing] a  
 2 compelling government interest.’” *Id.* (citation omitted). Thus, the Court must first find that the  
 3 disputed regulation creates a “substantial burden” before reaching the question of “compelling  
 4 interest.” Whether a land use regulation imposes a substantial burden is a question of law. See  
 5 *id.*; see also *Livingston Christian Schools v. Genoa Charter T’ship*, 858 F.3d 996, 1001 (6th Cir.  
 6 2017).

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

### 15 1. Feasible alternatives

16 In evaluating whether a land use regulation imposes a substantial burden, the availability  
 17 of feasible alternatives to the property affected by the challenged land use regulation is a relevant  
 18 consideration under Ninth Circuit law. For example, the Ninth Circuit affirmed a district court’s  
 19 entry of summary judgment in favor of a city on a college’s RLUIPA substantial burden claim  
 20 where “there is no evidence in the record demonstrating that College was precluded from using  
 21 other sites within the city.” *San Jose Christian College*, 360 F.3d at 1035-36. By contrast, the  
 22 Ninth Circuit affirmed summary judgment in favor of a religious organization on its RLUIPA  
 23 substantial burden claim where a county denied of the organization’s applications for a conditional  
 24 use permit on two different properties, finding that “[t]he net effect of the County’s two denials ...  
 25 is to shrink the large amount of land theoretically available to [the religious organization] under  
 26 the Zoning Code to several scattered parcels that the County may or may not ultimately approve.”  
 27 *Guru Nanak Sikh Soc.*, 456 F.3d at 991-92

28 A case that illustrates the significance of feasible alternatives to the substantial burden



1 analysis is *Victory Center v. City of Kelso*, which involved a zoning regulation that, similar to the  
2 regulation in this case, sought to encourage pedestrian-oriented retail activity on the street level  
3 within a four-block subarea of the city’s “Commercial Town Center.” No. 3:10-cv-5826-RBL,  
4 2012 WL 1133643, at \*1 (W.D. Wash. Apr. 4, 2012). A Washington district court granted  
5 summary judgment in favor of the city on a religious organization’s RLUIPA substantial burden  
6 claim, finding that city’s zoning regulations “do not impose a substantial burden of the Victory  
7 Center’s religious exercise because the Victory Center is free to locate its facility anywhere  
8 outside the [Commercial Town Center] flour-block subarea dedicated to pedestrian retain activity”  
9 or even “within this subarea anywhere above the first floor.” *Id.* at \*4. The court noted that “[t]he  
10 city estimates that the restricted area represents less than one eighth of one percent of zoned land  
11 within the city limits” and “locating outside of this small area does not substantially impede the  
12 Victory Center’s ability to practice religious activities,” particularly where “the Victory Center has  
13 not presented any evidence that the [location at issue] bears any religious significance ... and any  
14 burden imposed by the [] land use restrictions is merely a matter of personal or economic  
15 convenience.” *Id.*

16 It appears to be undisputed that New Harvest’s current location at 357 Main Street is not a  
17 feasible alternative. In addressing other sites, both parties submit evidence in the form of  
18 declarations regarding the availability of alternatives. New Harvest submits the declaration of  
19 Robert W. Burgess, a licensed commercial real estate broker who is familiar with commercial  
20 properties in the City. Dkt. 38 (Burgess Decl.) at ¶¶ 1-3. Mr. Burgess states that as of the date of  
21 his declaration (February 18, 2020), only three of the 24 locations advertised for sale were in “the  
22 size range that might be considered.” *Id.* at ¶ 5. Mr. Burgess indicates that two of the three  
23 properties are leased investments that were occupied and for which New Harvest would act as a  
24 landlord. *Id.* The third location is a 14,700 square foot church offered for sale at \$2345,000 (\$160  
25 per square foot). *Id.* That property is located at 747 El Camino Real, nine miles north of Main  
26 Street, and can be reached by driving north from Salinas on Highway 101 North and making a U-  
27 turn on the highway to reach the property via Highway 101 South. *Id.*; Dkt. 48-1 at Ex. E.

28 The City has presented evidence that New Harvest told the City at least as early as June

1 2000 that it was looking for a new location. Dkt. 28-5 at ¶ 3 and Ex. B at 2. The City submits the  
2 declaration of Dean Chapman, a consulting expert in the field of appraised value of commercial or  
3 residential real property and other real estate matters. Dkt. 48-3 (Chapman Decl.) at ¶ 2.  
4 Mr. Chapman states that based on his review of public records for the period 2012 to 2019, he  
5 identified the sales of nine churches and other properties with square footage suitable to house  
6 New Harvest’s religious worship and other activities and within or close to its price range. Id. at  
7 ¶ 4 and Ex. B. The City has also presented evidence that it has denied only one of over 100  
8 conditional use permit applications submitted by churches over the past fifty years. Dkt. 28-5 at  
9 ¶ 12. Meanwhile, according to Pastor Torres, who testified as New Harvest’s Rule 30(b)(6)  
10 designee, New Harvest considered only two properties between 2003 and its purchase of the  
11 Beverly Building in 2018: one property was unavailable because it was zoned industrial, and New  
12 Harvest did not submit a purchase offer for the second because Pastor Torres was out of the  
13 country. Ex. A to Dkt. 48-1 at 78:13-81:13.

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

1 Even without evidence concerning specific available properties, such as that presented by  
2 the City in this case, courts in this circuit have rejected substantial burden claims based on the  
3 religious organization's ability to relocate elsewhere. See, e.g., *Victory Center*, 2012 WL  
4 1133643, at \*4 (granting summary judgment to city on undue burden claim under RLUIPA where  
5 plaintiff was free to locate its facility anywhere outside the four-block area affected by the  
6 disputed zoning ordinance); see also *Daniel and Francine Scinto Found'n v. City of Orange*, No.  
7 SA CV 15-1537-DOC (JCGx), 2016 WL 4150453, at \*11 (C.D. Cal. 2016) (denying plaintiff's  
8 motion for summary judgment on RLUIPA undue burden claim where plaintiff did not cite  
9 anything indicating it was precluded from carrying out its religious mission or religious activities  
10 at other locations).

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

## 14 **2. Uncertainty, delay, and expense**

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

## 23 **3. New Harvest's own actions**

24 The City presents evidence that New Harvest was aware at the time it bought the Beverly  
25 Building that it was not zoned for assembly uses on the ground floor and that the City would  
26 oppose the church's efforts to conduct religious services there. Ex. A to Dkt. 28-1 at 153:6-  
27 155:19; Ex. D to Dkt. 28-5 at 17:19-18:12; see also Dkt. 1 at ¶¶ 31, 33. The City argues that a  
28 self-imposed burden is not a substantial burden under RLUIPA and that thus New Harvest cannot

1 prevail on its substantial burden claim because New Harvest purchased the Beverly Building  
2 without a reasonable expectation of being allowed to use that property for its intended religious  
3 purposes. See Dkt. 28 at 13-14 (citing *Livingston Christian Schools*, 858 F.3d at 1004; *Andon,*  
4 *LLC v. City of Newport News, Va.*, 813 F.3d 510, 515 (4th Cir. 2016); *Petra Presbyterian Church*  
5 *v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007)).

6 New Harvest argues that “[i]n this jurisdiction, it is not an affirmative defense to any of  
7 RLUIPA’s four provisions that a religious institution acquired property ‘without a reasonable  
8 expectation of being able to use that land for religious purposes.’” Dkt. 45 at 3 (citing City’s  
9 motion for summary judgment at 12). New Harvest notes that the authorities cited by the City in  
10 support of its self-imposed burden argument are from other circuits. Dkt. 45 at 2-3. New Harvest  
11 also cites several cases from the Ninth Circuit and courts within the circuit in which churches  
12 prevailed despite apparently purchasing properties prior to permit approval and with knowledge of  
13 zoning restrictions. *Id.* at 3-4 and cases cited therein.

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

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

#### 25 **4. Conclusion on substantial burden claim**

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

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

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

16 **B. Equal Terms Claim**

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

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1 (citing 42 U.S.C. § 2000cc-2(b)).

2 **1. Facial violation**

3 Section 37-40.310(a)(2), (3) does not, on its face, establish a prima facie violation of  
4 RLUIPA’s equal terms provision. Such a violation has been found where, for example, a city  
5 code allowed secular membership organizations as of right but required religious organizations to  
6 obtain a conditional use permit. See *Centro Familiar*, 651 F.3d at 1175. By contrast, the text of  
7 Salinas’s zoning provision treats secular and religious places of assembly the same: neither are  
8 allowed on the ground floor in the Main Street restricted area. Section 37-40.310(a)(2)  
9 (“Assembly and Similar Uses. Clubs, lodges, places of religious assembly, and similar assembly  
10 uses shall only be permitted above the ground floor of buildings facing Main Street within the  
11 downtown core area.”). As such, New Harvest has failed to demonstrate that the assembly uses  
12 provision, on its face, violates RLUIPA’s equal terms provision. See *Calvary Chapel Bible  
13 Fellowship v. County of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020).

14 New Harvest also argues that Salinas’s zoning ordinance violates the equal terms provision  
15 because it allows “live entertainment” in the form of “musical, theatrical, dance, karaoke, cabaret  
16 or comedy act” in secular venues but not religious assemblies within the Main Street restricted  
17 area. Dkt. 35 at 10-11 (citing Zoning Code Section 37-40-.310(a)(3)(A)). This argument  
18 overlooks the fact that these six types of entertainment are permitted in the Main Street restricted  
19 area only as accessory uses to a permitted underlying principal use, such as a restaurant, art  
20 gallery, music studio, or food and beverage sales establishment. See Ex. C to Dkt. 28-5 at Section  
21 37-40.310(a)(3). On its face, this accessory use provision is neutral as to content, allowing both  
22 religious and secular music and other entertainment as accessories to otherwise-permitted uses.  
23 Thus, the existence of the accessory uses provision also does not establish a facial violation of  
24 RLUIPA’s equal terms provision.

25 **2. “As applied” violation**

26 Turning to the question of whether the City’s application of its zoning ordinance violates  
27 RLUIPA’s equal terms provision, the Court views the key inquiry to be as set forth in *Centro  
28 Familiar*: the City violates the equal terms provision only when a church is treated on less than

1 equal basis with a secular comparator, similarly situated with respect to accepted zoning criteria,  
 2 such as “parking, vehicular traffic, and generation of tax revenue.” See *Centro Familiar*, 651 F.3d  
 3 at 1173 (citing *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 373  
 4 (7th Cir. 2010) (en banc)).

5 **a. Accepted zoning criteria**

6 The goal of the City’s assembly uses provision is “to stimulate commercial activity within  
 7 the City’s downtown, which had been in a state of decline, and to establish a pedestrian-friendly,  
 8 active and vibrant Main Street.” Dkt. 28-5 at ¶ 5; see generally Dkt. 40-2 at 20:13-22 (deposition  
 9 testimony of Megan Hunter that focus in downtown core area is on “creating a special  
 10 entertainment oriented mixed use district with residential above the ground floor stories where you  
 11 have a lot of excitement, vibrancy ...”); Ex. C to Dkt. 28-5 at Section 37-40.290 (defining  
 12 “Purpose” of central city overlay regulations to include “(a) Encourag[ing] and accommodat[ing]  
 13 the increased development intensity for mixed use, commercial, retail, and office uses within the  
 14 central city ... (c) Promot[ing] live entertainment uses in the downtown core area of the city ..; and  
 15 (3) Encourag[ing] pedestrian-oriented neighborhoods where local residents and employees have  
 16 services, shops, entertainment, jobs, and access to transit within walking distance of their homes  
 17 and workplace.”).

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

28 Accordingly, the Court finds that the City’s accepted zoning criteria are “to stimulate

1 commercial activity within the City’s downtown, which had been in a state of decline, and to  
 2 establish a pedestrian-friendly, active and vibrant Main Street.” See Dkt. 28-5 at ¶ 5.

3 **b. Main Street theaters and cinemas**

4 The Court must next consider whether the assembly uses provision treats New Harvest on  
 5 a less than equal basis with similarly situated secular comparators with respect to the City’s zoning  
 6 criteria. New Harvest identifies the following four uses within the Main Street restricted area as  
 7 relevant comparators: Maya Cinema, El Rey Theater, Fox Theater, and Ariel Theatre. Dkt. 35 at  
 8 5-6, 12. According to New Harvest, these four properties are “similarly situated secular  
 9 comparators with respect to the zoning criteria.” Id. at 12. New Harvest characterizes the four  
 10 uses as “secular assemblies.” Id. New Harvest’s arguments and evidence regarding the operations  
 11 of the four cinemas/theaters, which focus on seating capacity, are as follows:

- 12 • **Maya Cinema:** New Harvest states that this cinema is a “modern facility which  
 13 shows first run films” in “14 theater rooms, all located on the ground floor” with  
 14 one theater room seating 177, one seating 144, and the rest seating 44 persons.  
 15 Dkt. 35 at 6; see also Dkt. 42 (Andrews Decl.) at ¶ 3.
- 16 • **El Rey Theater:** New Harvest states that this theater had 800 seats when it  
 17 opened in 1935, currently has a seating capacity of 400 on the main floor. Dkt. 35  
 18 at 6; Dkt. 36 at ¶ 17; Dkt. 40-8. According to New Harvest, this theater has sat  
 19 vacant for a number of years but has recently been sold. Dkt. 35 at 6.
- 20 • **Fox Theater:** New Harvest describes this property as a “multi-purpose venue”  
 21 that “hosts weddings, quinceneras, business conferences, live music concerts, live  
 22 comedy shows, and banquets.” Dkt. 35 at 6. According to New Harvest, the  
 23 building has multiple meeting rooms located on the first and second floors and  
 24 advertises rentals of its facilities with banquet seating for 350 and wedding  
 25 ceremony seating for over 500 persons. Id.; see also Dkt. 36 at ¶ 18.
- 26 • **Ariel Theatre:** New Harvest states that this is a venue with a capacity of 289  
 27 persons that houses a non-religious children’s theater program where children and  
 28 youth perform in large stage productions on Fridays and Saturdays and where



1 classes for children are offered. Dkt. 35 at 5-6; see also Dkt. 37 (Palacio Decl.) at  
2 ¶ 4.

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

5 They are open to the general public. Their doors are open regularly and for extended  
6 periods throughout the week. They draw tourists and City residents who are seeking  
7 leisure or entertainment. Their windows and doors are large and open to the street,  
8 promoting foot traffic and personal safety. They form the backbone of Main Street's  
9 commercial activity. Unlike private clubs and churches, cinemas and theatres support all  
10 of the City's regulatory purposes.

11 Dkt. 48 at 9 (emphasis in original).

12 To evaluate a RLUIPA equal terms claim, the Court must identify the "objective criteria  
13 addressed in the [challenged] code section" and evaluate whether the disallowed religious use is  
14 similarly situated to "any secular comparator permitted in, not excluded from, the zone."

15 Archbishop of Seattle, 28 F. Supp. 3d at 1169 (citing *Centro Familiar*, 651 F.3d at 1174).

16 According to expert testimony regarding city planning submitted by Salinas, which New Harvest  
17 does not refute, "[i]n the city planning field, it is well known that private assembly-type uses ...  
18 detract from a city's efforts to promote a vibrant, pedestrian-friendly downtown" because such  
19 uses are "typically open only to organization members, operate during limited hours, generate  
20 limited interest among the general public, and typically have 'blank facades.'" Dkt. 28-2 (Aknin  
21 Decl.) at ¶ 6. By contrast, "movie theatres, nightclubs, restaurants, bars and other entertainment  
22 venues ... tend to attract far greater numbers of pedestrians to a city's downtown, again  
23 encouraging increased commercial activity and a vibrant downtown atmosphere" because such  
24 uses "are generally open more days of the week and hours of the day, including evenings and  
25 weekends, are freely open to the general public, attract [a] far greater number of people into a  
26 downtown area, and generate interest among city residents, residents from nearby communities,  
27 and tourists to a far greater extent than do private clubs or churches." *Id.* at ¶ 7, Ex. A.

28 With regards to New Harvest's proffered comparators, New Harvest has failed to show that  
the Maya Cinema or Fox Theater are relevant comparators. While the seating capacity of the  
Maya Cinema and Fox Theater may be similar to New Harvest's proposed use of the Beverley

1 Building, New Harvest’s own evidence establishes that these properties, unlike New Harvest, offer  
2 numerous activities throughout the week that would reasonably be expected to attract the general  
3 public, such as first run films, weddings, concerts, comedy shows, and other events. By contrast,  
4 New Harvest offers no evidence that its activities actually draw any non-members, and no  
5 evidence that its activities have a positive impact on commercial activity or vibrancy within the  
6 Main Street restricted area.

7 Similarly, New Harvest has failed to establish that the El Rey Theater is a relevant  
8 comparator. The only evidence presented by New Harvest regarding the El Rey Theater is its  
9 seating capacity, both currently (400 seats on the ground floor) and when the theater opened in  
10 1935 (800 seats). Dkt. 35 at 6; Dkt. 36 at ¶ 17; Dkt. 40-8. However, this capacity information  
11 provides no basis for comparing the operations of the El Rey Theater to New Harvest’s proposed  
12 use of the Beverly Building with respect to the City’s zoning criteria of stimulating commercial  
13 activity and vibrancy in the Main Street restricted area.

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

26 Based on the evidence in the record concerning the particular Main Street cinemas and  
27 theaters identified by New Harvest, the Court concludes that these properties are not “similarly  
28 situated” to New Harvest’s proposed use of the Beverly Building with respect to the City’s zoning

1 criteria, which seek “to stimulate commercial activity within the City’s downtown, which had  
 2 been in a state of decline, and to establish a pedestrian-friendly, active and vibrant Main Street.”  
 3 See Dkt. 28-5 at ¶ 5. Accordingly, the permitting of theaters and cinemas within the Main Street  
 4 restricted area does not establish a prima facie violation of RLUIPA’s equal terms provision.

5 **c. Other uses in Downtown Core Area**

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

16 **V. CONCLUSION**

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

- 18 1. New Harvest’s evidentiary objections (Dkt. 46) are **OVERRULED**.
- 19 2. The City’s evidentiary objections (Dkt. 48 at 21-22) are **OVERRULED**.
- 20 3. New Harvest’s request for judicial notice (Dkt. 41) is **GRANTED**.
- 21 4. New Harvest’s motion for summary judgment (Dkt. 35) is **DENIED**.
- 22 5. The City’s motion for summary judgment (Dkt. 28) is **GRANTED**.

23 **SO ORDERED.**

24 Dated: May 29, 2020

25  
 26 

27 SUSAN VAN KEULEN  
 28 United States Magistrate Judge