IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

O CENTRO ESPÍRITA BENEFICENTE
UNIÃO DO VEGETAL (UDV-USA),
a New Mexico corporation, on its own behalf
and as representative of its members,
O CENTRO ESPÍRITA BENEFICENTE
UNIÃO DO VEGETAL, NUCLEO SANTA FE (UDV),
a New Mexico corporation, on its own behalf
as representative of its members,
THE AURORA FOUNDATION,
a Texas corporation,

Plaintiffs,

v. No. CV-12-105 MV/LFG

BOARD OF COUNTY COMMISSIONERS
OF SANTA FE COUNTY,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM

Defendant's motion to dismiss plaintiffs' complaint for failure to state a claim (Doc. 22) is meritless for a number of reasons, as we explain in detail below. The most fundamental problem with defendant's motion is that defendant is not asking the Court to consider the legal sufficiency of the complaint, which is the purpose of a motion under Rule 12(b)(6). Instead, the defendant has attached to its motion selected documents from the administrative record, and has asked the Court to assume that the statements in those documents are true and, on that basis, to reject the allegations in plaintiffs' complaint and dismiss it. This is not proper under Rule 12(b)(6). A related problem is that many of the issues that defendant has asked the Court to resolve are fact-intensive and therefore not amenable to disposition under Rule 12(b)(6). Defendant's arguments also rest on fundamental misunderstandings of the Religious Land Use and Institutionalized Persons Act (RLUIPA), the First and Fourteenth Amendments, and the

New Mexico Religious Freedom Restoration Act (NMRFRA). Because the allegations in the complaint are adequate to support all of plaintiffs' claims, the Court should deny the motion.

THE COMPLAINT

A. Introduction.

Plaintiffs, referred to throughout as the UDV or the church, allege that defendant County Commission denied the UDV's application for a permit to build their church on land in the Arroyo Hondo area of Santa Fe, thereby imposing a substantial burden on the church's religious exercise. The UDV alleges that defendant's stated reasons for denying its application were pretextual; defendant denied the application without credible evidentiary support and without any compelling or even rational basis; defendant imposed requirements on the church's application that it has not imposed on other applicants and that are found nowhere in the land use code; defendant treated the church's application discriminatorily as compared with applications of other churches and facilities; and defendant has effectively prohibited the church from building a temple anywhere in Santa Fe County. The UDV claims that defendant's conduct violated RLUIPA, the First and Fourteenth Amendments, and NMRFRA.

B. Factual allegations.

The UDV is a well-established, highly-structured Christian, spiritist religion. It originated in Brazil and was formally established there in 1961. The UDV has thousands of followers in Brazil with more than 150 temples in all major cities, and the government of Brazil recognizes that the church is legitimate. (Compl. ¶ 14.)

Central and essential to UDV's religion and faith is the sincere, sacramental use of *hoasca,* a tea made from two plants native to the Amazon River basin. The church imports its sacrament from Brazil, after it is prepared during religious rituals held for that purpose. Church law prohibits use of the sacrament outside of the religious context. (Id. ¶ 15.) It is also a principle of UDV's faith that alcohol and drugs should not be used by its members. (Id. ¶ 17.)

The issue of whether UDV's religion was protected under American law became a

subject of controversy in this Court more than twelve years ago because the church's sacrament contains a small amount of naturally-occurring dimethyltryptamine (DMT), a Schedule I controlled substance. In affirming UDV's members' right to practice their religion, Judge Parker ruled that the government had failed to demonstrate that UDV's exercise of its religion represented any risk to the health and safety of its members or any risk of diversion to the public. See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236 (D.N.M. 2002).

The government appealed to the Tenth Circuit Court of Appeals, which twice affirmed Judge Parker's decision. See O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004) (en banc); O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170 (10th Cir. 2003). The Supreme Court unanimously affirmed. See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006). The United States and UDV entered into an agreement under which UDV would take precautionary storage measures that satisfied all of the Drug Enforcement Administration's safety and diversion concerns. (Compl. ¶ 16.) Thus, after an enormous expenditure of time, effort, and money, church members were finally free to practice their religion without fear, and they developed plans for their permanent structure at 5 Brass Horse Road in Santa Fe.

The UDV's history on the land at 5 Brass Horse Road began in the early 1990s. On December 4, 1993, Luis Felipe Belmonte dos Santos (Mestre Felipe), the highest spiritual authority of the UDV at that time, traveled from Brazil to Santa Fe. At a meeting on Brass Horse Road, where the plaintiffs now wish to build their church, Mestre Felipe delivered the documents establishing the UDV community in the United States. This event is of enormous spiritual significance to the members of the UDV. (Compl. ¶ 21.) From that time until 2006, the UDV held regular religious services in a yurt on Brass Horse Road and celebrated weddings, baptisms and religious holidays there. (Id. ¶ 22.) The UDV moved to a temporary location after it outgrew the temporary structure on Brass Horse Road. But it always intended to build a

permanent church at that location, which is of spiritual significance. (Id. ¶¶ 18-23.)

UDV's temporary location is a studio that has unfinished plywood floors and unfinished plaster walls. (Id. ¶¶ 26, 28.) There is no potable water. (Id. ¶ 32.) The heating and cooling are inadequate for services, and it has many other deficiencies for use as a facility for religious ceremonies and the associated functions. (Id. ¶¶ 29-34.) This was to be only a temporary location until the congregation could build its church on the Brass Horse Road property, which a member of the church will donate if it can be used for that purpose. (Id. ¶¶ 24-35.)

In 2009, the church applied to defendant Santa Fe County for a permit to build its church. When some of the residents of the Arroyo Hondo area learned that the church intended to submit an application, they complained to defendant and its staff. (Id. ¶ 36.) Many of their complaints were what are often referred to as NIMBY ("not in my back yard") complaints. The NIMBY complaints included that the church would increase traffic and noise, would harm the character of the neighborhood, would cause light pollution, and would disturb area residents. (Id. ¶ 37.) Their complaints are belied by the fact that the UDV had conducted its church services at the location in question for fourteen years, during which time neither the church nor the county had ever received a single complaint. (Id.)

Other complaints were based on the opponents' misunderstanding of UDV's religion and its members' sacramental use of *hoasca*. They complained, for example, that UDV members' driving would be impaired; the *hoasca* would contaminate the local groundwater; the church would contribute to a drug trade in the neighborhood and threaten the safety of neighborhood children; and the presence of the church would increase crime in the neighborhood. (Id. ¶ 38.)

No basis exists for any of the neighbors' complaints or expressed worries. (Id. ¶ 38.) The federal government, with unlimited resources, in the course of a two-week evidentiary hearing before Judge Parker was unable to establish that the UDV's exercise of its religion represented any threat to its own members' or the public's health or safety. (Id.)

Thus the church's 2009 application was for permission to build a permanent church on

the property its parishioners had used for their religious services for fourteen years, without any complaint by a single nearby resident. (Id. ¶¶ 41.) At that time, the Santa Fe congregation had about 80 parishioners. (Id. ¶ 42.) UDV's originally-proposed church included a space for religious services, a nursery, a common room, kitchen and dining room, a storage room, bathrooms, a greenhouse and a caretaker's residence. (Id. ¶ 45.) Ceremonies at the facility, including regular services, baptisms, weddings, instructional sessions and the like would occur approximately 66 times per year. (Id. ¶ 46.)

When the church applied for its permit, the Santa Fe Land Use Code classified churches as a type of "community service facility." (Id. ¶ 47.) Other facilities in the same category are "governmental services such as fire stations, elementary and secondary day care centers, schools and community centers." (Id.) The code allowed community service facilities to be built anywhere in the county, provided the facility was necessary for the provision of the services and compatible with existing and permitted development. (Id. ¶ 48.)

Although the church's application satisfied all code requirements for churches and other community service facilities (id. ¶ 49), defendant imposed additional requirements not called for in the Code. For example, defendant required the church to undergo a rezoning process (id. ¶ 51). Imposing this requirement had the effect, in addition to significantly increasing the cost of the application, of requiring final approval by the County Commission, an elected body, rather than land use experts who were members of defendant's staff and defendant's appointed development committee. (Id. ¶ 52.) Plaintiffs protested these new requirements. (Id. ¶ 53.)

On August 21, 2009, defendant's Water Resources Specialist informed the church that its application was complete with respect to water use and availability. (Id. ¶ 54.) However, after withdrawing the church's application from the Commission's agenda for the October 15, 2009, meeting at the last minute, defendant's staff informed the church that its application was incomplete because it lacked an archeology survey and report. (Id. ¶ 57.) Under the code, however, a lot of this size did not require an archaeology report. (Id.)

In December of 2009, defendant's representative informed the church that defendant had received "voluminous correspondence and public comment regarding the UDV application." (Id. ¶ 58.) Defendant also informed the church that defendant's hydrologist had changed his mind and had determined that UDV's provision for water was inadequate. (Id. ¶ 59.)

In addition to imposing these unusual requirements, defendant required the church to meet additional requirements that it had not imposed on any other community service. For example, the defendant required UDV to submit a liquid waste disposal plan and include defendant as a "named insured" on an insurance policy to protect defendant in the event that a UDV member caused an accident while operating a motor vehicle. (Id. ¶¶ 61-63.) Defendant also informed the church that its application would not be considered complete until it had addressed "public safety" issues. (Id. ¶ 68.) Defendant had not imposed these requirements on other applicants, including establishments selling alcoholic beverages. (Id. ¶¶ 70, 71.)

One year after UDV's application, defendant amended the land use code, specifically targeting UDV by codifying some of those requirements it had previously imposed and shifting to the County Commission the final authority to approve an application for a community service facility, such as UDV's application to build its church. (Id. ¶ 74.)

Almost eighteen months after UDV submitted its application, the County Development Review Committee (CDRC) finally took up UDV's application. (Id. ¶ 75.) At the meeting, defendant's staff, which had spent over 15 months analyzing UDV's application, recommended approval, explaining that the UDV plan was compatible with area development and met all other requirements. Staff further explained that churches had always been considered to be "a compatible use in a residential area." (Id. ¶ 76.) At the meeting, some area opponents filled the record with groundless objections related to water and sewage, and whether the building was consistent with surrounding development. The opponents made numerous false and derogatory statements about the UDV and its proposed building. (Id. ¶ 77.) The CDRC, which consists of appointed residents with expertise in land use issues, approved the church's application for

master plan rezoning. (Id. ¶ 78.)

Defendant placed the matter on their agenda of February 8, 2011, but suddenly tabled the matter. (Id. ¶¶ 84, 85.) Defendant's staff then informed the church that it would be advisable to drill a well and commission a hydrologic report establishing water availability. The church did so, and the results showed that the available water was more than adequate. (Id. ¶ 86.)

Defendant did not consider the church's application until June 14, 2011, six months after it had first been scheduled for consideration. (Id. ¶ 87.) At the County Commission meeting, County staff addressed all of the objections, including compatibility with surrounding development, traffic issues, architectural standards, safety, water availability and use, the liquid waste system, water management, fire protection, landscaping and archaeology. Defendant's staff informed defendant that staff and the CDRC recommended approval. (Id. ¶¶ 89, 90.) Defendant again tabled the matter, this time until July 12, 2011. (Id. ¶ 93.)

At the hearing on July 12, 2011, defendant denied the application by a vote of three to two, with Commissioners Anaya, Holian and Mayfield voting to deny and Commission Chair Vigil and Commissioner Stefanics voting to approve. (Id. ¶ 95.) And on October 25, 2011, twenty-seven months after the church submitted its application, defendants entered an order denying it. (Id. ¶ 96.)

Defendant's denial rests on factual findings without support in the record; findings that are contrary to the great weight of evidence; findings that are directly contrary to the conclusions of defendant's own, independent consultants, contrary to its own staff's conclusions and the recommendations of the CDRC; and findings on issues that the land use code did not require plaintiffs or defendant to address. (Id. ¶ 96.)

The findings were pretextual. Defendant's rejection of the church's application was based on defendant's hostility toward the UDV's religion, as well as defendant's political motives. Id. ¶ 103. Since 1981, when Santa Fe County adopted its first zoning ordinance, defendant has approved 54 churches' applications. (Id. ¶ 104.) In the last two decades, it has

rejected only one—the UDV's. (Id. ¶ 105.) Defendant's order reflected further unreasoned hostility toward the UDV by finding that the Plaintiffs should not be permitted to build a church anywhere in Santa Fe County. (Id. ¶¶ 106-7.)

The fundamental question presented in this litigation is whether the plaintiffs will be permitted to build a small church in which to meet and worship, at the same spot where they practiced their religion for over a decade without complaint by the relatively distant neighbors or whether, instead, the UDV will be prohibited from building a temple on their land or, for that matter, anywhere in Santa Fe County.

LEGAL STANDARD FOR MOTION TO DISMISS

In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), the Supreme Court crafted a new standard under Rule 8 and Rule 12(b)(6). To withstand a motion to dismiss, a complaint must have enough allegations of fact, taken as true, "to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. The Court explained that two working principles underlie this standard. First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Iqbal, 129 S. Ct. at 1949. Thus, mere "labels and conclusions," and "a formulaic recitation of the elements of a cause of action" will not suffice; a plaintiff must offer specific factual allegations to support each claim. Twombly, 550 U.S. at 555. Second, a complaint survives a motion to dismiss if it "states a plausible claim for relief[.]" Iqbal, 129 S. Ct. at 1950. The factual allegations must "raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 129 S. Ct. at 1950. Thus, in ruling on a motion to dismiss, a court should consider whether the specific factual allegations, if assumed to be true, plausibly suggest liability. Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1214 (10th Cir. 2011).

When analyzing a Rule 12(b)(6) motion, the Court should "accept all factual allegations

in the complaint as true and draw all reasonable inferences in favor of the nonmoving party[.]" Mink v. Knox, 613 F.3d 995, 1000 (10th Cir. 2010). "It is not necessary . . . for the complaint to contain factual allegations so detailed that all possible defenses would be obviated." Griffin v. Home Depot USA, Inc., No. 11-2366-RDR, 2012 WL 38647, at * 1 (D. Kan. Jan. 9, 2012). The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Bikur Cholim, Inc. v. Vill. of Suffern, 664 F. Supp. 2d 267, 273 (S.D.N.Y. 2009) (RLUIPA case); see also Sattar v. Holder, No. 07–cv–02698–PAB–KLM, 2012 WL 882401, at * 4 (D. Colo. Mar. 15, 2012) (D. Colo. 2012). (declining to dismiss prisoner's religious freedom claim under Rule 12(b)(6) because it involved "fact-intensive" determination).

In this case, the church has pled specific facts sufficient to support every one of its claims. Accordingly, the Court should deny defendant's motion.

ARGUMENT

I. Defendant may not rely on exhibits to its motion for the truth of the matters asserted therein.

Instead of attacking the adequacy of the allegations in the church's complaint, as the rule requires, defendant asks the Court to assume the truth of defendant's own factual assertions that appear nowhere in the complaint—including factual claims that the church would vigorously dispute with evidence of its own in response to a summary judgment motion or at trial. Defendant's factual claims rest largely on exhibits that defendant carefully selected from the record of the land use proceedings, which defendant invites the Court to rely on for the truth of the matters set forth therein. As we explain below, the law prohibits this. The Court should not consider the assertions in the defendant's exhibits. The only inquiry, at this stage, is whether the complaint satisfies Rule 12(b)(6).

The general rule is that "consideration of material attached to a defendant's answer or motion to dismiss requires the court to convert the motion into one for summary judgment and

afford the parties notice and an opportunity to present relevant evidence." Tal v. Hogan, 453 F.3d 1244, 1264 n. 24 (10th Cir. 2006). One exception to the general rule is that "facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment." Id. Under this exception, a court deciding a motion to dismiss may "take judicial notice of its own files and records, as well as facts which are a matter of public record." Id. (quotation marks and quoted authority omitted). But there is a critical limitation: "the documents may only be considered to show their contents, not to prove the truth of the matters asserted therein."[1] Id. (quotation marks and quoted authority omitted).

Defendant has ignored this limitation by asking the Court to rely on factual assertions in its exhibits. Those exhibits include defendant's order denying the church's application and detailing the defendant's findings, which the church alleges are baseless and pretextual. The exhibits also include transcripts of portions of the land use hearings, including the testimony of experts the opponents of the church's application hired—testimony that contradicts the findings of defendant's land use staff and the findings of defendant's committee of appointed land use experts. What follows is a non-exhaustive list of some of defendant's attempts to use these and other exhibits to try to establish the truth of the factual assertions therein:

> 1. "[T]he complaint and the record demonstrate that . . . Congregants would leave in up to 50 vehicles by a narrow, winding rural road that goes through a quiet, single-family residential neighborhood[.]"[2] (Motion at 2; see also Motion at 13 ("permissible documentary evidence" and complaint show that "UDV's application is characterized by extraordinary late night usage in a quiet single-family residential neighborhood with its attendant traffic and disturbance").

[1] Defendant does not mention this limitation in its footnote that purports to justify its reliance on the factual assertions in its exhibits. (Motion at 10 n.4.) However, in one of the cases cited in the defendant's footnote, this Court recognized the limitation. See Genesee County Employees' Retirement System v. Thornburg Mortgage Securities Trust, 825 F. Supp. 2d 1082, 1122 n.20 (D.N.M. 2011) ("The Court finds that, so long as it takes judicial notice only of the existence and content of the submitted, publicly filed documents, but does not assume the truth of the statements therein, it does not run afoul of the Tenth Circuit's rule on this issue.").

[2] This assertion contradicts the allegation in the complaint that the land where the church plans to build its temple is "near the entrance to the Arroyo Hondo neighborhood." (Compl. ¶ 19.) At the appropriate time, the church will prove that the traffic from the temple would only pass by one house, which is owned by a member of the UDV.

2. Defendant's denial of the church's application was reasonable "[b]ased on the inconsistency of the [church's] use with the existing and permitted residential uses in the neighborhood and other issues regarding water usage and wastewater treatment and disposal[.]" (Motion at 2 (implicitly relying on defendant's denial order and testimony at hearing).)

3. "[T]he Board denied the application because the proposed facility does not meet the standards for a community service facility as it is not compatible with existing development in the area and is not compatible with development permitted under the Code." (Motion at 9; see also Motion at 19 ("The Board denied the instant application based on various permissible land-use considerations."); Motion at 20 (similar); Motion at 21 (similar).)

4. "Despite perfunctory contentions to the contrary [in the church's complaint], the Arroyo Hondo neighborhood is characterized exclusively by large-lot, single-family residential development." (Motion at 13–14 & n.5 (citing letter from opponent of church's application).)

5. "[T]he neighborhood is devoid of any disturbance-producing, non-residential uses." (Motion at 14.)

6. "The comparative magnitude of the proposal, together with the late-night usage and traffic compels the conclusion that the operation is inconsistent with the existing development in the area and with development permitted under the Code." (Motion at 14.)

7. "[T]he allegations of the complaint and the record confirm that the application was denied pursuant to the neutral criteria of the Code for valid reasons." (Motion at 16.)

8. "[T]he evidence demonstrates that [alternative] sites [for the church] do exist." (Motion at 16.)

9. "As the hearing record demonstrates (Exhibit 'D'), the purported 'businesses' located in Arroyo Hondo to which Plaintiffs may seek to compare themselves are not similarly situated in any respect." (Motion at 26 (citing document prepared by opponents of church); see also Motion at 26 ("[A]s is demonstrated by the annexed map (Exhibit 'E') . . . the uses to which Plaintiffs may be comparing themselves are not similarly situated with respect to location.").)

10. There are no other community service facilities in the area where the church proposes to build its temple. (Motion at 26 (quoting hearing testimony of opponent of church's application in Exhibit A).)

> 11. "Establishments serving alcohol to the public are not permitted in residential areas and are only permitted in commercial districts with commercial 'nodes' located on collector roads or intersections of collector roads." (Motion at 27 (citing map, Exhibit F).)
>
> 12. "The map referred to above [Exhibit E] depicts all religious uses in the area and demonstrates that none are in the Arroyo Hondo neighborhood. None of those uses are comparable because they are not located within a residential area, are located on main roads and additionally, are located on larger lots[.]" (Motion at 29.)
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> 13. "[T]he permissible documentary evidence establishes that Plaintiffs' proposed services and activities are not similarly situated to any house of worship." (Motion at 29.)
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> 14. "[A]s is demonstrated above based on permissible documentary evidence of which the Court may take judicial notice, Plaintiffs' application was not treated differently than any similarly situated applicant." (Motion at 37.)
>
> 15. "[T]he record repudiates any vague claim that any [existing] use [by those other than the UDV church] is characterized by the same disturbance-causing impacts." (Motion at 38.)

Tenth Circuit precedent prohibits defendant from relying on exhibits to establish the truth of these and other factual assertions to support its Rule 12(b)(6) motion.

Defendant's approach is especially problematic in this case because a key question is whether the defendant's stated reasons for denying the church's application, as set forth in defendant's order, are merely post-hoc, pretextual justifications for a decision that defendant actually made based on impermissible considerations, including unlawful discrimination. Defendant asks the Court to simply accept its own order at face value and find—based on exhibits that consist largely of the defendant's statements, the church's opponents, and the opponents' experts—that the defendant applied its land use code neutrally and did not discriminate against the church. Defendant's claims contradict the allegations in the complaint, which are presumed true at this juncture. (Compl. ¶¶ 96-107.)

The Court should disregard all factual assertions in defendant's motion to dismiss that

rest on representations in defendant's selected exhibits. Under Rule 12(d), if the Court chooses to consider the factual assertions in the exhibits to defendant's motion in determining whether summary judgment is appropriate, it should notify the parties, require defendant to amend its motion to comply with Local Civil Rule 56.1(b), and afford the parties the opportunity to present evidence pertinent to the summary judgment motion. The church would then submit evidence to prove the factual allegations in its complaint and disprove defendant's claims.

II. The church has adequately stated claims under RLUIPA's substantial burden, unequal terms, and nondiscrimination provisions.

A. Overview of RLUIPA: history, purpose, and relevant provisions.

In Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court held that "the First Amendment's Free Exercise clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct." Cutter v. Wilkinson, 544 U.S. 709, 714 (2005). One of Congress's responses was RLUIPA, which was enacted to add greater protection to religious liberty than the protection the First Amendment offered. RLUIPA increased protection in two contexts: the use of real property for religious purposes and the exercise of religion in prisons. Cutter, 544 U.S. at 715. In the land use context, "RLUIPA's purpose was to address what Congress perceived as inappropriate restrictions on religious land uses, especially by 'unwanted' and 'newcomer' religious groups." Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1170 (9th Cir. 2011). Before enacting RLUIPA, "Congress compiled a substantial amount of statistical and anecdotal data demonstrating that governmental entities nationwide purposefully exclude unwanted religious groups by denying them use permits through discretionary and subjective standards and processes." Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 994 (9th Cir. 2006). This evidence led the co-sponsors of RLUIPA, Senators Orrin Hatch and Edward Kennedy, to conclude that, "Churches in general, and new, small, or unfamiliar churches in particular, are frequently

discriminated against . . . in the highly individualized and discretionary processes of land use regulation. . . . [O]ften, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" 146 Cong. Rec. S7774–01 (daily ed. July 27, 2000).

To address this discrimination, Congress enacted a powerful statute. Under RLUIPA, when a government implements land use regulations—including neutral and generally applicable regulations—in a way that substantially burdens religious exercise, the burden is presumptively unlawful. 42 U.S.C. § 2000cc(a). In addition, RLUIPA holds governments strictly liable when they discriminate between those who seek to use land for religious purposes and those who seek to use land for secular purposes, § 2000cc(b)(1), and when they discriminate between land users of different religions, § 2000cc(b)(2). As we explain below, the church has stated claims under RLUIPA's substantial burden provision and discrimination provisions.

B. The church has pled a violation of the substantial burden provision of RLUIPA.

1. The substantial burden section of RLUIPA.

The church has adequately pled that defendant has violated the substantial burden section of RLUIPA, which provides:

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

42 U.S.C. § 2000cc. The person or institution seeking to use land for religious purposes bears the burden of establishing that the imposition or implementation of the land use regulation

substantially burdens religious exercise. 42 U.S.C. § 2000cc-2(b). Once the religious land user demonstrates that the government has substantially burdened its religious exercise, the government may only justify the burden on the land user by proving that the specific burden is the least restrictive means of furthering a compelling government interest.

2. The church has adequately pled that defendant's decision substantially burdens its religious exercise.

The church has made detailed factual allegations in support of its claim that defendant's denial of the church's application has substantially burdened the church's religious exercise, and those allegations are more than adequate to state a RLUIPA claim. First, defendant's arbitrary and hostile treatment of the church's application has already resulted in unnecessary and extraordinary expense and delay. In addition, any future application would not only be expensive and take additional time, it would be futile. Second, defendant applied its land use code arbitrarily to the church's application. Third, defendant prevented the church from building a permanent temple that is adequate to meet its current needs, thereby forcing the church to continue to use the inadequate space that it currently rents. Fourth, defendant prevented the church from building a permanent temple on land that holds special religious significance to it and its members, and defendant prevented the church from complying with church law, which requires each congregation to work toward owning its temple.

As we explain below, these burdens, individually or collectively, are substantial. We begin by discussing the meanings of the relevant statutory terms and, in the course of doing so, identifying problems with certain arguments defendant has made about the meanings of those terms. We then explain, based on applicable precedents, why the allegations are sufficient.

RLUIPA requires the church to demonstrate that defendant has "impose[d] or implement[ed] a land use regulation in a manner that imposes a substantial burden on the religious exercise" of the church. 42 U.S.C. § 2000cc(a)(1). RLUIPA defines "religious

exercise" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). "The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B).

Ignoring this definition, defendant contends that building a church is not a fundamental aspect of religious exercise (Motion at 13), citing Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 825 (10th Cir. 1988), which is not a RLUIPA case (RLUIPA did not yet exist). Messiah Baptist involved a First Amendment free exercise claim, and RLUIPA "substantially modified and relaxed the definition of 'religious exercise.'" Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 663 (10th Cir. 2006). The plain language of RLUIPA, the purpose of the statute, its legislative history, and RLUIPA jurisprudence confirm that the defendant's contention is wrong. Before enacting RLUIPA, Congress determined that churches "cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. S7774 (daily ed. July 27, 2000). Indeed, "having a place of worship . . . is at the very core of the free exercise of religion," and "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." International Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1069 (9th Cir. 2011) (quotation marks and quoted authority omitted). The UDV's construction of a church is a critical part of its religious exercise under RLUIPA.

RLUIPA does not define "substantial burden." Defendant quotes from a number of decisions by federal courts in different circuits, implying that they have settled on one definition of substantial burden that applies under all circumstances. However, as we explain below,

courts' "substantial burden" definitions and analyses have depended on the nature of the religious entity's RLUIPA claims and the specific facts of each case.

In an attempt to raise the substantial burden bar, defendant mischaracterizes the church's claim and relies on a number of inapposite cases. Defendant tries to reframe the church's claim as an attack on the land use code itself: "a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise." (Motion at 11; see also Motion at 13.) Defendant then cites several cases involving RLUIPA challenges to provisions of zoning codes that excluded churches from certain areas or required churches to obtain special use permits to build in certain areas. UDV makes no such claim. There is no reason to do so because defendant's land use code permits churches "anywhere in the county," and defendant's land use staff have "always considered churches as a compatible use in a residential area[.]" (Complaint, Doc. 1, ¶¶ 48, 76.) The church's claim is not that the land use code itself is substantially burdensome; it is that defendant implemented its code in a substantially burdensome manner.

Accordingly, Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (CLUB) and similar cases involving challenges to land use code provisions do not support defendant's motion. (Motion at 12.) In CLUB, the Seventh Circuit held:

> in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise---including the use of real property for the purpose thereof within the regulated jurisdiction generally---effectively impracticable.

Id. at 761 (emphasis added). CLUB involved a challenge to a land use regulation that prevented the construction of churches in particular parts of Chicago without a special use permit. CLUB did not involve the kind of challenge the UDV has made in this case—a claim that the denial of its application to use a specific parcel of land that was zoned for churches is substantially

burdensome. It follows that CLUB and similar cases involving challenges to specific land use regulations that prohibit churches from locating in certain zones do not support defendant's motion to dismiss the church's substantial burden claim. See Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (rejecting church's request to enjoin zoning ordinance that banned churches from industrial zone; "the fact that [churches] are not permitted to build everywhere does not create a substantial burden"); Konikov v. Orange County, 410 F.3d 1317, 1323-24 (11th Cir. 2005) (holding that zoning code, which allowed religious use in certain areas only if user obtained special use permit, was not substantially burdensome); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227-28 (11th Cir. 2004) (holding that zoning ordinance that excluded churches from business district, requiring congregants to "walk[] a few extra blocks" to temple, was not substantially burdensome); Christian Gospel Church, Inc. v. City and County of San Francisco, 896 F.2d 1221, 1224-25 (9th Cir. 1990), superseded by RLUIPA (holding that "zoning scheme" prohibiting churches in residential areas without conditional use permit imposed only minimal burden for purposes of Free Exercise Clause).[3]

Indeed, after CLUB, the Seventh Circuit recognized that a significant difference exists between the kind of burden that can result from the denial of a church's application and the kind of burden inherent in having to apply for and obtain a permit. In Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005), which involved the denial of church's permit application, the Seventh Circuit did not apply the demanding standard it had applied in CLUB and that it would later apply in Petra Presbyterian Church. The court explained that a different approach was necessary because the church was not

[3] In these inapposite cases, the courts do not define "substantial burden" uniformly. In Midrash Sephardi, the Eleventh Circuit concluded that the Seventh Circuit's standard incorrectly requires a religious organization to show a complete exclusion of or unreasonable limitation on religious assemblies or structures. Midrash Sephardi, 366 F.3d at 1227. But this Court need not weigh in because neither CLUB nor Midrash Sephardi governs the UDV's claim.

challenging a permit requirement. See Sts. Constantine, 396 F.3d at 899-900 (distinguishing CLUB). The court recognized that the permit denial substantially burdened the church because of the "delay, uncertainty, and expense" that would be involved in finding another parcel of land or in continuing to submit applications for the same parcel. Id. at 900-01.

Defendant also attempts to raise the bar by arguing that the church "possess[es] an insurmountable burden in asserting a substantial burden claim" because "[t]he land use and community service facilities provisions of the County Code are neutrally applicable regulations." (Motion at 13.) Defendant is wrong. The implementation of a land use code that is neutral and generally applicable may substantially burden religious exercise. RLUIPA applies "even if the [substantial] burden results from a rule of general applicability[.]" 42 U.S.C. § 2000cc(a)(2)(B). Indeed, "Congress passed RLUIPA to reinstate the strict scrutiny standard that had been applied—prior to Smith—to certain laws, including generally applicable, facially neutral zoning laws pursuant to which governments may make 'individualized assessments' of the property at issue." Int'l Church of Foursquare Gospel, 673 F.3d at 1066.

Courts have crafted abstract definitions of "substantial burden." The Ninth Circuit has held that a burden that results from the implementation of a land use regulation is substantial if it "imposes a significantly greater restriction or onus on any exercise of religion, whether or not compelled by, or central to, a system of religious belief." San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004) (internal quotation marks and quoted authority omitted). And the Second Circuit has explained that the "burden need not be found insuperable to be held substantial." Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007).

However, such abstract definitions are of limited value because whether particular burdens are substantial under RLUIPA depends on "the facts of each case[.]" Guatay Christian Fellowship v. County of San Diego, 670 F.3d 957, 982 (9th Cir. 2011); see also Adkins v. Kaspar, 393 F.3d 559, 571 (5th Cir. 2004) (holding that determining whether religious exercise

has been substantially burdened under institutionalized persons provision RLUIPA is "a case-by-case, fact-specific inquiry"); Irshad Learning Center v. County of DuPage, 804 F. Supp. 2d 697, 716 (N. D. Ill. 2011) (describing "substantial burden" as "issue of fact," which depends on magnitude of burden "in relation to the needs and resources of the religious organization in question"). Fact-intensive inquiries like this should not be made on a Rule 12(b)(6) motion. See Brilliance Audio, Inc. v. Haights Cross Communication, Inc., 474 F.3d 365, 370 (6th Cir. 2007) (holding that "fact-based inquiry" could not properly be made on Rule 12(b)(6) motion); McLaughlin v. Boston Harbor Cruise Lines, Inc., 419 F.3d 47, 48 (1st Cir. 2005) (holding that "fact-dependent issue" was "best decided after a full factual record ha[d] been compiled" and that "it was error to dismiss this case at the 12(b)(6) stage"); Sattar, 2012 WL 882401, at * 4 (declining to dismiss prisoner's religious freedom claim under Rule 12(b)(6) because it involved "fact-intensive" determination). The Court should not resolve the substantial burden question at this juncture, unless it concludes that the UDV's substantial burden claim is not "plausible." Twombly, 550 U.S. at 570.

The church's allegations make its substantial burden claim more than plausible. Although the allegations would be sufficient even if the Court were to consider each type of burden separately, the Court should consider the following burdens in the aggregate.

a. Delay, expense, and futility.

The church has alleged, based on defendant's own findings and its treatment of the church in the application process, that if the church were to apply for permission to build a temple, either on the church's land or at some other location, such an application would be futile. In addition, any such application would result in significant delay and expense, as the church's experience with its initial application proves. The church's allegations regarding futility, delay, and expense are sufficient standing alone.

Courts have held that the denial of permission to use land may be substantially burdensome when it causes "delay, uncertainty, and expense." Sts. Constantine and Helen Greek

Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005); Reaching Hearts International, Inc. v. Prince George's County, 584 F. Supp. 2d 766, 786 (D. Md. 2008) aff'd 368 Fed. Appx. 370 (4th Cir. 2010) (holding that "expenditure of substantial funds" and "delay and uncertainty" resulting from defendant's actions in processing church's application "also qualify as a substantial burden under RLUIPA"); Grace Church of North County v. City of San Diego, 555 F. Supp. 2d 1126, 1136-38 (S.D. Cal. 2008) (holding that expenditure of significant money in application process and uncertainty with respect to future use of property were substantially burdensome). "That [such a] burden would not be insuperable would not make it insubstantial." Sts. Constantine, 396 F.3d 895 at 901.

The UDV incurred significant expense and endured significant delay in the proceedings regarding its application, and it would surely face considerable expense and delay in submitting another application. Defendant's dilatory and hostile approach to the church's application required the church to engage in a two-year battle involving a number of experts and lawyers. Defendant repeatedly and unjustifiably imposed requirements on the church that were found nowhere in the land use code and requirements that had not been imposed on other applicants, and defendant repeatedly and unnecessarily delayed and increased the cost of the administrative proceedings, ultimately denying the church's application two years after it was filed. (Compl. ¶¶ 27, 41, 55-75, 80-94, 96, 97, 108, 112.) The financial burden also includes the cost of obtaining another parcel in Santa Fe on which to build because defendant has indicated that it will never permit the church to build its temple on the land it has obtained for a nominal cost. (Compl., ¶ 106 (finding compelling interest in excluding church from all residential areas.) See Lighthouse Community Church of God v. City of Southfield, Civil Case No. 05-40220, 2007 WL 30280, at * 9 (E.D. Mich. Jan. 3, 2007) ("Selling its current building and searching for another is not a mere inconvenience to Plaintiff. Instead, the Court finds that the burden is substantial.") These allegations regarding expense and delay are adequate, standing alone, to defeat defendant's motion to dismiss the substantial burden claim.

Expense and delay are not the most serious problems facing the church. Uncertainty with respect to a future application can be sufficient to establish a substantial burden, but the outcome of any future UDV application is not merely uncertain. It would be futile for the church to submit another application, as defendant has indicated that a permanent UDV temple is not welcome anywhere in Santa Fe County. See Guru Nanak, 456 F.3d at 990-91 (finding substantial burden based in part on inference that no permit would ever be granted). Based on the church's religious beliefs and practices, including its lawful use of its sacrament, defendant has found that permitting the church to build a temple would "'set[] a precedent that transforms [Santa Fe County] into a mecca for drug use.'" (Compl. ¶ 107 (quoting order denying application).) Defendant's own findings—coupled with its hostile approach to the church's application and its arbitrary denial of the application—demonstrate that defendant will not approve any future UDV application. (Compl. ¶¶ 50-52, 57, 59, 61-64, 66-71, 73, 86, 97-107.)

Now that the church has filed a lawsuit, defendant purports to be open to a second UDV application, stating that it might allow the church to build "either in a non-residential area or in a residential area with access to the main thoroughfare."[4] (Motion at 19-20.) The suggestion that defendant might grant an application to build a UDV temple in a residential area directly conflicts with defendant's finding that it has "a compelling interest in zoning the [UDV's] use to a non-residential neighborhood." (Compl. ¶ 106 (quoting defendant's order)). Based on this finding and defendant's hostility toward and arbitrary treatment of the UDV's original application, it is reasonable to infer that defendant's purported openness to another application is insincere. See Fortress Bible Church v. Feiner, 734 F. Supp. 2d 409, 503 (S.D.N.Y. 2010) (noting "overwhelming evidence of Defendants' intentional delay, hostility, and bias toward the Church's application" and finding "that any purported willingness by the Town Board to consider a modified proposal is insincere").

[4] This statement contradicts the church's allegation that the land where the church seeks to build does have access to a "main" thoroughfare, the Old Las Vegas Highway. (Compl. ¶ 19.) As the UDV will prove at the appropriate time, traffic from the proposed temple would not pass any house other than one owned by a member of the church.

Because it would be futile to submit another application, defendant's "ready alternative" argument has no merit. (Motion at 16-17.) Even if there is another affordable and appropriate parcel of land in Santa Fe County and even leaving aside, for the sake of argument, the religious significance of the land in Arroyo Hondo, defendant's hysterical and unsupported finding that allowing the UDV to build a temple would risk transforming Santa Fe County "'into a mecca for religious drug use'" could not more vividly reveal defendant's bias. (Compl. ¶ 107 (quoting order denying application).) Accordingly, there are no alternatives for a permanent, adequate temple in Santa Fe County, much less "quick, reliable, and financially feasible alternatives." Westchester Day School, 504 F.3d at 352.

b. Arbitrary, capricious, and unlawful denial of permit application.

The church has alleged that defendant's denial of the church's application was arbitrary, capricious, and contrary to defendant's own land use code. Courts have held that a government entity's "arbitrary, capricious, or unlawful" denial of permission to use land for religious purposes may constitute a substantial burden. For example, in Westchester Day School, 504 F.3d at 350-51, the court concluded that the church was substantially burdened in part because the zoning board's findings were not supported by substantial evidence and were "unsupported by its own experts." The Court determined that "the zoning decision . . . was characterized . . . by an arbitrary blindness to the facts." Id. at 352. In fact, "the application was denied not because of a compelling governmental interest that would adversely impact public health, safety or welfare, but was denied because of undue deference to the opposition of a small group of neighbors." Id. at 353 (emphasis added). Other courts have found substantial burdens for similar reasons. See Guru Nanak Sikh Soc'y v. County of Sutter, 456 F. 3d 978, 989-91 (9th Cir. 2006) (concluding substantial burden existed because government "inconsistently applied" policies and disregarded relevant findings "without explanation"); Sts. Constantine, 396 F.3d at 901 (recognizing an "uncertain outcome" that supports a finding of substantial burden, "given the whiff of bad faith" arising from land use authority's actions); Fortress Bible Church v.

Feiner, 734 F. Supp. 2d 409, 503 (S.D.N.Y. 2010) (considering "overwhelming evidence of Defendants' intentional delay, hostility, and bias toward the Church's application" and "find[ing] that the Church's religious exercise was substantially burdened by . . . arbitrary and unlawful denial of its application").

As the church has alleged, defendant's actions were similar to those in the cases cited above. The church has alleged in detail that the findings that defendant used to justify its denial of the church's application (1) were contrary to the conclusions of defendant's own experts, the conclusions of defendant's own land use staff, and the recommendations of defendant's development committee, (2) were not based on credible evidence, (3) pertained to issues that the land use code did not require defendant or the church to address, and (4) were pretext masking defendant's true reasons for denying the church's application, including its deference to the unfounded objections of the opponents of the church. (Compl. ¶¶ 2, 3, 49, 75-78, 89-90, 96-102, 103.) These allegations are more than sufficient to establish a substantial burden.

c. Inadequacy of temporary facility.

The UDV's allegations that its temporary leased facility is inadequate to meet the church's needs are sufficient to state a substantial burden claim under Rule 12(b)(6). "[T]he denial of space adequate to house" a church's operations may constitute a substantial burden. International Church of Foursquare Gospel, 673 F.3d at 1070; see also Westchester Day School, 504 F.3d at 352-53 (holding that decision confining religious school to inadequate facility was substantially burdensome); Sts. Constantine & Helen, 396 F.3d at 898, 901 (holding that denial of variance to church that had outgrown its facilities was substantially burdensome when denial resulted in delay, uncertainty, and expense). The church has alleged that its temporary location, which it leases, is inadequate in a variety of ways, including that it is too small for the church's growing congregation (Compl. ¶ 31); does not have potable water (id. ¶ 32); is not equipped for the elderly or people with disabilities (id. ¶ 33); is unfenced, resulting in trespassing that has disrupted religious services (id. ¶ 34); and is uncomfortably hot in the summer and

uncomfortably cold in the winter (id. ¶ 29). Defendant's denial of the church's application to build a permanent temple that would meet its needs has forced the church to continue to endure the conditions in its temporary location.

Defendant cites Living Water Church of God v. Charter Township of Meridian, 258 Fed. Appx. 729, 730 (6th Cir. 2007), in which a church with 120 members was already operating in a 10,925-square-foot building on land that it owned. The church asked the township to allow it to expand to 35,000 square feet; the township approved 28,500 square feet. Id. The Sixth Circuit concluded—based on "[t]he facts before [it]," developed during a bench trial—that the denial of the church's request was not substantially burdensome. Id. at 742. The court observed that even though the existing church was "too small," the church did not have "free reign to construct on its lot a building of whatever size it chooses, regardless of limitations imposed by the zoning ordinances." Id. at 739. Living Water is not precedent for any broad legal principle. Indeed, the court explicitly declined to adopt any particular substantial burden test, opting instead to "look for a framework to apply to the facts before [it]." Id. at 737. The court's decision was fact-driven and illustrates the need to consider evidence when making the substantial burden determination. In any event, the facts of this case bear no resemblance to the facts in Living Water. The UDV's congregation, which is not much smaller than Living Water Church's was, currently gathers in a rented studio that, among other things, lacks potable water, has deficient heating and cooling, and is not equipped for the elderly and disabled. See Irshad Learning Center, 804 F. Supp. 2d at 716 (whether burden is substantial depends on its magnitude "in relation to the needs and resources of the religious organization in question"). The UDV seeks only to build and own a permanent temple adequate to suit its current needs. The fact-based holding of Living Water does not establish that UDV's claim fails the plausibility test.

d. Religious significance of the land UDV owns and church law regarding ownership of land where it holds religious services.

The church has alleged that it applied to build a temple on land that holds special religious significance.[5] (Compl. ¶¶ 18-23.) The church has also alleged that church law requires each congregation to work toward owning the land where it holds its religious services, and that the church has executed a purchase agreement under which it may buy the land for a nominal sum if it can be used as the location of a permanent UDV temple. (Id. ¶¶ 27, 35.) The burden resulting from defendant's refusal to allow the church to build on this particular land—despite the fact that the church's application satisfies every requirement of the land use code, as defendant's land use staff and land use committee found—increases the already substantial burden on the church. Counsel for the church have not discovered cases in which courts have held that it is substantially burdensome to (1) deny permission to build on land with special religious significance[6] or (2) thwart a church's effort to follow religious doctrine regarding ownership of the land where its place of worship is located. Perhaps this is because no government agency has ever been bold enough to take such actions. In any event, it is not necessary for the Court to resolve those two issues to dispose of defendant's motion because the church's other substantial burden allegations are sufficient. If the Court has any doubt that those other allegations, considered together, are sufficient to defeat defendant's motion to dismiss, the

[5] Defendant's contention that the church's allegation is "factually dubious" (Motion at 18) is not appropriate in support of a motion to dismiss. Like the Court, defendant must treat the allegation as true for the purpose of this motion. That the church's growth required it to temporarily use another location does not disprove the allegations about the religious significance of the land. Defendant's argument about the amount of time the church has been unable to use the land that has religious significance is ironic because defendant's actions have delayed the construction of a permanent temple by over two years.

[6] Some courts have noted, while finding no substantial burden based on the specific facts before them, that there was no claim that the land had religious significance. See Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 275 (3rd Cir. 2007) ("[W]e do not assume, without any allegation in this sense on the part of the plaintiff, that obtaining use of the particular property at issue here has any religious significance."); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 654-55 (10th Cir. 2006) (similar); Midrash Sephardi, 366 F.3d at 1228 (similar).

Court should also consider the burdens related to the religious significance of the land and to the church's inability to hold its services on land it owns, consistent with church law.

Defendant attempts to twist the church's argument about the importance of the proposed site of its permanent temple, stating that "no church has a right under RLUIPA to locate a building of worship wherever it desires, regardless of the requirements of the applicable land use regulations and regardless of its inconsistency with the neighborhood."[7] (Motion at 16, 17.) The church agrees. That is precisely why the church ensured that its application met all of the requirements of defendant's land use code and that its proposed temple was consistent with the neighborhood. Indeed, defendant's own land use staff, defendant's own development committee, defendant's own experts, and two members of the Santa Fe County Commission concluded that the church's application complied with the land use code, including its requirement of compatibility with the neighborhood. (Compl. ¶¶ 2, 49, 75-79, 88-90, 95, 97, 98, 99.) Three members of the Commission voted to deny the application, but, as alleged in the complaint, their votes were not based on the requirements of the land use code. They were based on improper considerations, including animus toward the church based on its religious beliefs and practices and the unfounded objections of the church's opponents. (Id. ¶¶ 95-103.) The church has never claimed that RLUIPA shields it from the land use code.

3. At this stage, defendant cannot prove that the burden it has imposed on the church is the least restrictive means of furthering a compelling interest.

At the motion to dismiss stage, it is impossible for defendant to prove that the burden its denial of the church's application placed on the church's religious exercise was the least

[7] Defendant contends that the church's use of the yurt for religious services was illegal. (Motion at 18.) The church disputes this. Defendant relies on testimony given during the administrative process, which defendant has improperly attached as an exhibit to its motion to dismiss. As the UDV will prove at the appropriate time, that testimony did not pertain to a question about whether the use of the yurt was legal. The question, eventually resolved through litigation, was whether the church's use of its sacrament was protected by the Constitution and RFRA.

restrictive means of furthering a compelling government interest. As explained below, defendant must put on evidence to carry its burden, and Tenth Circuit precedent prohibits defendant from doing so on a Rule 12(b)(6) motion. In addition, it is well established that broad interests such as the interest in enforcing zoning laws in general do not suffice; defendant must put on evidence to demonstrate that its denial of the UDV's application was the least restrictive means of furthering a compelling interest. To answer that fact-driven question, the Court must have an opportunity to consider evidence developed through discovery.

Under RLUIPA, the only way that defendant can justify its denial of the church's application is to demonstrate that the imposition of the burden on the church is the least restrictive means of furthering a compelling interest. This is strict scrutiny—"the most demanding test known to constitutional law." City of Boerne v. Flores, 521 U.S. 507, 534 (1997). Compelling interests are "interests of the highest order." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); see also Sherbert v. Verner, 374 U.S. 398, 406 (1963) (describing compelling interests as "'paramount interests'") (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). The least restrictive means prong of the test requires defendant to "show that it considered and rejected less restrictive measures because the less restrictive measures were not effective to serve the compelling interest at issue." Rocky Mountain Christian Church v. Board of County Com'rs of Boulder County, 612 F. Supp. 2d 1163, 1175-1176 (D. Colo. 2009), aff'd 613 F.3d 1229 (10th Cir. 2010).

Importantly, proving that defendant's denial of the church's application is the least restrictive means of furthering a compelling interest is an affirmative defense. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006) (recognizing that showing of compelling interest is part of government's "affirmative defense" under RFRA); Rocky Mountain Christian Church, 612 F. Supp. 2d at 1175 (same under RLUIPA). The church need not plead facts to show that defendant did not have a compelling interest or that it did not employ the least restrictive means. To succeed with its affirmative defense and survive strict

scrutiny, defendant must carry its burdens of production and of persuasion. See 42 U.S.C. § 2000cc-5(2) ("The term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion."). Because defendant must come forward with evidence as to both the compelling interest and least restrictive means prongs of the test, defendant may not pass the test at the Rule 12(b)(6) stage.[8] See Bikur Cholim, Inc. v. Village of Suffern, 664 F. Supp. 2d 267, 277-78 (S.D.N.Y. 2009) (holding that it was not appropriate to determine, on motion to dismiss, whether defendant had proven that its action was least restrictive means of furthering compelling government interest; adequacy of land use application should be reviewed "based on the full record as developed through discovery," not based on allegations in complaint).

Yet defendant seeks to carry its burden by asking the Court to accept as true the factual assertions in the exhibits to its motion to dismiss—factual assertions made by defendant, opponents of the church's temple, and the opponents' experts. For example, defendant argues, "As is related herein, the application was deficient under the applicable, neutral land-use criteria, and denial was dictated by the inconsistency of the proposed use with the rural, single-family residential character of the neighborhood." (Motion at 20.) This assertion, which pertains to a critical disputed issue, rests on exhibits to defendant's motion. As we explained in Section I, Tenth Circuit precedent prohibits defendant from using exhibits in this fashion.[9]

Precedent also prohibits defendant's other approach to satisfying strict scrutiny. Defendant seeks to rely on its interest in enforcing its land use code as a general, abstract matter. (Motion at 20-21.) But RLUIPA requires defendant to make a more focused showing.

[8] A government entity could carry its burden on a Rule 12(b)(6) motion if it were clear from the allegations in the complaint that the government's action was the least restrictive means of furthering a compelling interest. But defendant does not make (and could not credibly make) any such argument.

[9] Even on a summary judgment motion, when the Court could consider evidence, it would not be appropriate to apply the deferential standard of review that New Mexico courts apply to factual findings made by administrative bodies in zoning proceedings. (Motion at 15-16.) The appropriate standard of review is strict scrutiny, which does not involve deference to the government.

Defendant must prove that the imposition of the burden on the particular land user, in this case the UDV, is the least restrictive means of furthering a compelling interest. See Westchester Day School, 504 F.3d at 353 (holding that general interest in enforcing regulations did not satisfy strict scrutiny under RLUIPA and that government "must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general); Bikur Cholim, 664 F. Supp. 2d at 291 ("While upholding zoning laws may be considered a compelling interest, the [land use authority] must demonstrate that the enforcement in those zoning laws is compelling in this particular instance, not in the general scheme of things."); Reaching Hearts International, Inc. v. Prince George's County, 584 F. Supp. 2d 766, 788 (D. Md. 2008) ("A 'compelling interest' is not a general interest but must be particular to a specific case[.]"). The interests defendant has in enforcing its zoning code as a general matter do not satisfy strict scrutiny as a matter of law.[10]

Determining whether the denial of the UDV's application was the least restrictive means of furthering a compelling government interest requires a fact-driven inquiry. See Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1107 (9th Cir. 2008) (strict scrutiny requires "a case-by-case determination, sensitive to the facts of each particular claim" (quotation marks and quoted authority omitted)); In re Grand Jury Empaneling of Special Grand Jury, 171 F.3d 826, 839 (3rd Cir. 1999) (explaining that "least restrictive means" test is "fact-intensive"); 146 Cong. Rec S7774, 7775 ("The compelling interest test is a standard that responds to facts and contexts."). Accordingly, now is not the time for defendant to present its compelling

[10] Even if a general interest could satisfy strict scrutiny under RLUIPA, a government entity's interest in enforcing its zoning laws is not powerful enough to qualify as "compelling." Defendant cites San Jose Christian College v. City of Morgan Hill, No. C091–20857, 2001 WL 1862224, at *3 (N.D. Cal. Nov. 14, 2001), where the court stated that a municipality has a "strong" interest in maintaining "the integrity of its zoning schemes." But the court did not make that statement in support of a holding that the city had a compelling interest and therefore satisfied strict scrutiny. In this case, of course, there is no provision of the County's land use code that UDV's application violated in any respect, either on its face or in the opinion of County staff.

interest/least restrictive means defense.

C. The church has adequately pled a violation of RLUIPA's unequal terms section.

The church has alleged sufficient facts to plead a violation of RLUIPA's equal terms provision, which states, "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1).[11] The crux of defendant's argument is that the church must identify identically situated, non-religious entities that were treated more favorably. (Motion at 25.) That is not the law. To survive a Rule 12 (b)(6) motion, the church need only allege that it was treated on less than equal terms than a similarly situated secular entity. Rocky Mountain Christian Church v. Bd. of County Com'rs, 613 F.3d 1229, 1236-37 (10th Cir. 2010) cert. denied, 131 S. Ct. 978 (2011) (plaintiff must show similarly situated---not identical---secular comparator for equal terms claim). "[A] discriminatory system designed to favor one class over another can be inferred from the circumstances." Reaching Hearts Int'l, 584 F. Supp. 2d at 781, aff'd, 368 F. App'x 370 (4th Cir. 2010).

The church has alleged facts to show both that secular entities were similarly situated to the church and that the church was treated less favorably. At the time the church applied for its permit with the defendant, the Santa Fe Land Use Code classified churches as one type of "community service facility." (Compl. ¶ 47.) Other facilities in the same category are "governmental services such as fire stations, elementary and secondary day care centers, schools

[11] Defendant claims that even if the church makes out a *prima facie* equal terms claim, defendant will defeat the claim with an affirmative "strict scrutiny" defense. (Motion at 23-24.) As a preliminary matter, the church strongly disagrees that this Court should follow the Eleventh Circuit's approach, as urged by the defendant, but instead should follow the Third Circuit's approach, which recognizes that the plain language of the equal terms provision allows for no affirmative defense. Compare Midrash Sephardi, 366 F.3d at 1232 with Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 269 (3rd Cir. 2007). However, as discussed in Section II(B)(3), given the procedural posture of this case, the Court does not have to decide whether an affirmative defense exists.

and community centers." (Id.) At that same time, the Code allowed community service facilities to be built anywhere in the County, provided the facility was a) necessary for the provision of the services, and; b) is compatible with existing and permitted development. (Id. ¶ 48.) Within two miles of the church's proposed temple, the defendant has permitted twenty business and community service facilities. (Id. ¶ 101.) The Academy for the Love of Learning, is in a predominantly residential neighborhood that is close to the site of the proposed UDV temple, and the structure is more than twice the size of the proposed UDV temple. (Id.) The church has also alleged specific facts from which an inference of discrimination could be drawn, including significant departures from normal procedures, amendment of the code after the church's application was filed, and the baseless denial of the church's application. (Id. ¶¶ 51-54.)

Even defendant concedes that the church has identified in its complaint a similarly situated, non-religious entity that was treated more favorably than the church. (Motion at 25.) To get past this, defendant tries to place an extraordinarily onerous—and unfounded—pleading requirement on the church, baldly claiming that the church must plead facts to show that the comparators are "similar in all relevant respects." (Motion at 25.) The defendant fails to define "all relevant respects" and cites to no case that stands for that proposition. It appears to rely on a Third Circuit case, Lighthouse Institute, and a Seventh Circuit case, River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010) (en banc). In doing so, defendant ignores Tenth Circuit precedent.

In Lighthouse, the Third Circuit focused on "the regulatory purpose" of the regulation in question to determine whether a religious entity was treated less favorably than a secular entity, holding that "a religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the objectives of the challenged regulation." Lighthouse Institute, 510 F.3d at 268 (emphasis added). The Seventh Circuit agreed that "'equality' is a complex concept," and "[t]he fact that two land uses share a dictionary definition doesn't make them 'equal' within the meaning of a statute." River of Life,

611 F.3d at 371. But the Seventh Circuit disagreed with the Third Circuit's logic, holding that "the use of "'regulatory purpose'" as a guide to interpretation invites speculation concerning the reason behind exclusion of churches; invites self-serving testimony by zoning officials and hired expert witnesses; facilitates zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches (as by favoring public reading rooms over other forms of nonprofit assembly); and makes the meaning of "equal terms" in a federal statute depend on the intentions of local government officials." Id. at 371. Accordingly, the Seventh Circuit decided, the focus should be on the more "objective" accepted zoning criteria, although it conceded that the "zoning criteria" test was "less than airtight." Id. at 375.[12]

Citing Lighthouse, defendant urges the Court to require the church to "identify a better-treated secular comparator that is similarly situated in regard to the objectives of the challenged regulation." (Motion at 24.) But the defendant's focus on the Third Circuit's "regulatory purpose" test and the Seventh Circuit's "accepted zoning criteria" test is a distraction. The Tenth Circuit does not employ either test. The defendant fails to cite to the one case from the Tenth Circuit—Rocky Mountain Christian Church v. Bd. of County Commissioners, 613 F.3d 1229 (10th Cir. 2010)—that is both instructive as to the proper application of the law and factually similar to the instant case. In RMCC, the county argued that RMCC failed to demonstrate that it was similarly situated to the comparator it used at trial, the Dawson School. Id. at 1231–33. RMCC was located in a specially designated agricultural district, and the county denied its application for expansion. Id. at 1234. The county had previously approved the

[12] According to the Ninth Circuit, the variation between the Third and Seventh Circuit makes little difference. Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172–73 (9th Cir. 2011). But the church respectfully submits that the Court should not follow the approach the Third Circuit and Seventh Circuit have taken because that approach is inconsistent with the text of RLUIPA. The equal terms provision does not require the "land uses" to be "equal" or even require the "effects" of the uses to be equal. It requires the "terms" on which they are "treat[ed]" to be equal. 42 U.S.C. § 2000cc(b)(1). The difference is significant. The focus should be on equality of "terms"—what actions a government takes—rather than on the equality of "use" or "effects." No two land uses ever have identical effects.

Dawson School's special use application for expansion within an agricultural district. Id. There were several, significant differences between RMCC's application and the Dawson School's application: the School's expansion was half the size of RMCC's in terms of raw square footage (132,200 versus about 60,000); the School had proposed multiple small buildings compared to RMCC's larger structures; and RMCC's resulting traffic would exceed Dawson School's resulting traffic by ten times. Id. at 1236. Despite those differences, the Tenth Circuit noted that RMCC presented ample evidence of similarities between the projects at trial, finding that "[a]lthough the two proposed expansions were not identical, the many substantial similarities allow for a reasonable jury to conclude that RMCC and Dawson School were similarly situated." Id. at 1237. Here, the church has alleged that the Academy for the Love of Learning, like the Dawson School in RMCC, is in a similar neighborhood to the church, is designated a community service facility, as was the church, and is more than twice the size of the proposed UDV temple, suggesting a more significant impact on the community. (Compl. ¶ 101.) Whether the Academy for the Love of Learning or the other entities referred to in the complaint are similarly enough situated to the church and/or were treated more favorably than the church is a fact-driven determination that the Court cannot make without the benefit of evidence. RMCC, 613 F.3d at 1236-37; Bikur Cholim, 664 F. Supp. 2d at 292-93 (disputed issues of fact regarding equal terms claim were in dispute requiring trial).

Perhaps recognizing this, defendant makes the extraordinary and improper request that the Court take judicial notice of the facts contained in evidence attached to defendant's motion. Defendant has attached to its motion Exhibit D, an unsworn, unidentified, and conclusory statement alleging that the businesses the church cited are not "similarly situated in any respect." (Motion at 26; Ex. D.) Defendant in essence asks the Court to accept as fact that Exhibit D correctly lists the currently open businesses, accurately describes what the businesses do, and properly assesses the impact of traffic on the neighborhood. Defendant also asks the Court to take judicial notice of maps to show that the secular facilities are located in different

neighborhoods and that "[e]stablishments serving alcohol to the public are not permitted in residential areas[.]" (Motion at 27; Ex. F.) The Court also should ignore the defendant's argument in connection with the size of the entities listed on Exhibit E. As we explained in Section I, Tenth Circuit precedent prohibits defendant from using exhibits in this fashion on a Rule 12(b)(6) motion.

D. The church has adequately pled a violation of RLUIPA's discrimination section.

The church's allegations go well beyond stating a plausible claim that defendant violated RLUIPA's nondiscrimination provision, which states, "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). "There are few published cases considering [the nondiscrimination] provision of RLUIPA." Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga., 1:10-CV-00082-AT, 2012 WL 500263, *23 (N.D. Ga. Feb 10, 2012). But the nondiscrimination analysis and the equal terms analysis dovetail.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available…Sometimes a clear pattern…emerges from the effect of the state action even when the governing legislation appears neutral on its face." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (race-based discrimination). Even "where a stark pattern of discrimination is not evident, the courts should consider the following types of circumstantial evidence: (1) historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes, (2) the specific sequence of events leading up to the challenged decision, (3) departures from the normal procedural sequence, as well as substantive departures, (4) legislative or administrative history, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports, (5) foreseeability of discriminatory impact, (6) knowledge of discriminatory impact, and (7) the

availability of less discriminatory alternatives." Church of Scientology, 2012 WL 500263 at * 33; see also Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, Fla., 430 F. Supp. 2d 1296, 1321 (S.D. Fla. 2006) (denying motion to dismiss nondiscrimination claim because plaintiff connected religious affiliation with discrimination, described how city denied it special exception, and identified city's implementation of time limit on special exception and city's ultimate denial of a permanent special exception as first such measures city had ever imposed on religious institution).

Here, the church has made a number of specific allegations detailing both direct and circumstantial evidence of the defendant's discriminatory conduct. Although the church's application satisfied all of the criteria set forth in the code for churches and other community service facilities, defendant imposed additional requirements not called for in the code and not applied against other applicants. (Compl. ¶¶ 49, 51, 61, 62, 63, 68, 70, 71, 86.)

Moreover, one year after UDV submitted its application, defendant amended the land use code, specifically targeting UDV by codifying some of those requirements and shifting to the County Commission the final authority to approve an application for a community service facility, such as UDV's application to build its church. (Id. ¶¶ 73, 74.) In addition, defendant's denial of the church's application was arbitrary, resting on baseless findings that contradicted all reliable, credible assessments and recommendations. (Id. ¶ 96-103.)

Finally, defendant has also approved facilities for use by other religious groups throughout the county, including in predominantly residential neighborhoods. (Id. ¶ 101.) Recent examples include the Mission Viejo Christian Academy (nondenominational Christian), Santa Nino Regional Catholic School and Holy Family Praying Heart Portal (Catholic), and Santa Fe Southwest S.D.A. Adventist Church Texico Conference Association of Seventh Day Adventists. Furthermore, the Mountain Cloud Zen Center (Buddhist) is in a residential area that is close to the church's proposed temple. (Compl., ¶ 101.)

Instead of addressing this mountain of allegations supporting an inference of

discrimination, defendant attempts again, as it did in the equal terms section, to impose an extremely onerous and unjustified pleading requirement.[13] Defendant first argues that "[t]he application of a neutral ordinance may violate RLUIPA's nondiscrimination provision only if it differentially treats similarly situated religious assemblies on the basis of denomination." (Motion at 28, citing to Church of Scientology.) Defendant goes on to argue that the church "must allege the particulars of the purported similarly situated comparators which 'must be prima facie identical in all relevant respects'" and that the church has failed to do so. (Motion at 28.) The defendant is wrong on both points.

Defendant relies heavily on Church of Scientology, but it asks the Court to focus only on one part of that decision. As the court explains, there are actually three independent ways the nondiscrimination provision may be violated:

> (1) a statute that facially differentiates between religious assemblies or institutions; (2) a facially neutral statute that is nevertheless "gerrymandered" to place a burden solely on a particular religious assembly or institution; or (3) a truly neutral statute that is selectively enforced against one religious denomination as opposed to another.

Church of Scientology, 2012 WL 500263 at * 23. In this case, the church has alleged sufficient facts (Compl. ¶¶ 73-74) to show that the defendant's new ordinance—passed after the church submitted its application—is the kind of religious "gerrymandering" described by the Georgia district court. See Church of Scientology of Georgia, Inc., 2012 WL 500263, * 24 ("The Court's review of the Ordinance reveals that it was not 'gerrymandered' to burden only religious uses, such as Plaintiff's…the Ordinance was enacted before Plaintiff purchased the property[.]"); Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1309 (11th Cir. 2006) ("religious 'gerrymander' that departs from basic principles of neutrality may

[13] The defendant again begins its argument by erroneously arguing that if a plaintiff meets its initial burden of producing prima facie evidence, the government may then show that its "implementation of the land use regulation passes strict scrutiny [.]" (Motion at 27-28.) Like the equal terms provision, the nondiscrimination provision does not include any affirmative defense. However, for purposes of this motion, the Court may ignore this argument because this is not the time for affirmative defenses.

also support . . . Equal Terms violation").

Moreover, the church has made detailed allegations about how defendant "selectively enforced" its regulations against UDV. The church listed four separate, religious institutions in Santa Fe that defendant has approved, including at least one that is in a residential neighborhood substantially similar to the property at issue in this matter. (Compl. ¶ 101.) Defendant attempts to confuse the issue by stating that the "relevant" factor the Court must look at is whether the religious organizations are in the same neighborhood as the proposed site of UDV's temple. Defendant cites no authority to support this proposition. Moreover, the church has alleged with sufficient particularity that similar comparators exist and that defendant applied its land use code for the purpose of discriminating against the church. Church of Scientology, 2012 WL 500263, at * 24-25.

Further, defendant again cites improperly to Exhibits F and G, making conclusory statements about the nature of the properties on which the comparator religious organizations are located. But as explained above, Tenth Circuit precedent prohibits defendant from using exhibits in this fashion in a Rule 12(b)(6) motion. Moreover, defendant's efforts to use the exhibits confirm that this is a fact-driven inquiry that cannot be decided in favor of anyone but the church at this stage of the proceedings. "These issues must be determined by the factfinder unless, as a matter of law, Plaintiff puts forth insufficient evidence of discrimination to create a triable issue of fact on the issue." Church of Scientology of Georgia, Inc., 2012 WL 500263, *24. The church has adequately pled its discrimination claim.

E. RLUIPA authorizes claims for damages.

Defendant asserts—without any substantial supporting argument—that "the statutory terms of RLUIPA do not permit a claim for damages." (Motion at 30.) But the language of RLUIPA, its legislative history, Supreme Court precedent regarding remedies, and well-reasoned circuit and district court precedent establish that Congress intended for land use authorities who violate RLUIPA to compensate those they have harmed.

RLUIPA states, "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). "Appropriate relief" is a broad phrase.[14] Congress did not limit the remedies. It did not explicitly exclude certain remedies, such as damages. Nor did it enumerate a list of specific remedies, excluding all others by implication.

Had Congress intended to limit remedies for private plaintiffs and exclude compensatory damages, it would have done so clearly, just as it did in the subsection governing enforcement by the United States. "The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter." 42 U.S.C. § 2000cc-2(f). As another court has recognized, "Had Congress intended in § 2000cc-2(a) to limit relief available to individuals to injunctive or declaratory relief, Congress could have used the same language it used in § 2000cc-2(f). By choosing more expansive language with regard to the private cause of action, Congress likely intended that something more than injunctive or declaratory relief be available." Agrawal v. Briley, No. 02 C 6807, 2006 WL 3523750, at * 10 (N.D. Ill. Dec. 6, 2006). The legislative history confirms that damages are available under RLUIPA. The Congressional Record states that RLUIPA "create[s] a private cause of action for damages, injunction, and declaratory judgment[.]" 146 Cong. Rec. E1563-01.

In addition, the Court should presume that at the time Congress enacted RLUIPA, it was aware of the relevant Supreme Court precedent. Long before RLUIPA, the Supreme Court had held, "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 395 (1971). The Court had also held that the phrase "appropriate relief" encompassed damages. See Franklin v. Gwinnett County Public Schools, 503 U.S. 60

[14] Congress explicitly directed courts to construe RLUIPA broadly: "This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

(1992). In Franklin, the Court explained that when a federal statute creates a private right of action, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Id. at 66. The Court rejected the argument that it had abandoned "the traditional presumption in favor of all appropriate relief," including damages, and held that damages are available for victims of gender discrimination under Title IX. Id. at 69-70, 76. Knowing all of this, Congress chose to permit private plaintiffs to bring claims for "appropriate relief" under RLUIPA. So Congress must have intended to include damages claims. To hold otherwise, the Court would need to conclude that Congress intended for courts to construe the phrase "appropriate relief" in RLUIPA more narrowly than courts had construed that same phrase in other contexts before RLUIPA existed.

The only two federal appeals courts that have addressed the issue have held that damages are available under RLUIPA. See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011); Smith v. Allen, 502 F.3d 1255 (11th Cir. 2007), abrogated in part on other grounds by Sossamon, 131 S. Ct. 1651 (holding that states enjoy sovereign immunity from damages claims by prisoners under substantial burden provision of RLUIPA). In Centro Familiar, the Ninth Circuit reasoned:

> Franklin . . . holds that federal courts may award monetary damages against municipal entities, absent clear statutory indication to the contrary. Franklin uses the phrasing, used in RLUIPA, "appropriate relief." RLUIPA both uses the "appropriate relief" language and speaks without any "clear direction" excluding damages relief, so under Franklin, municipalities are liable for monetary damages for violations of RLUIPA.

Centro Familiar, 651 F.3d at 1168.

In Smith, the Eleventh Circuit held that "the use of the phrase 'appropriate relief' in section 3 of RLUIPA . . . is broad enough to encompass the right to monetary damages in the event a plaintiff establishes a violation of the statute." Smith, 502 F.3d at 1270. The Eleventh Circuit explained that "Congress expressed no intent to the contrary within RLUIPA, even

though it could have, by, for example, explicitly limiting the remedies set forth in § 2000cc(a) to injunctive relief only." Id. at 1270-71. The Eleventh Circuit "assume[d] that, when Congress acted, it was aware of Franklin's presumption in favor of making all appropriate remedies available to the prevailing party." Id.

A number of district courts have also held that RLUIPA permits damages claims. See Lighthouse Institute for Evangelism v. City of Long Branch, Civ No. 00-3366 (WHW), 2010 WL 1491079, at * 4 (D.N.J. Apr. 13, 2010) (treating award of damages as appropriate relief); Lighthouse Community Church of God v. City of Southfield, No. 05-40220, 2007 WL 756647, at * 3 (E.D. Mich. Mar. 7, 2007) (damages against government entity); Agrawal, 2006 WL 3523750, at * 9-12 (damages against state officials in individual capacities); Daker v. Ferrero, No. 1:03-CV-02481-RWS, 2006 WL 346440, at * 8-10 (N.D. Ga. Feb. 13, 2006) (same).

Defendant contends that "the case law is conflicting" as to whether damages are available under RLUIPA. (Motion at 30.) Defendant cites just one decision of a federal appeals court, Vinning-El v. Evans, 657 F.3d 591 (7th Cir. 2011). (Motion at 30.) But Vinning-El was based on Eleventh Amendment sovereign immunity, not on whether the language of RLUIPA permits damages claims. The court simply applied Sossamon v. Texas, 131 S. Ct. 1651 (2011), in which the Supreme Court held that states have not waived their sovereign immunity from suits by prisoners for damages under RLUIPA. Because the defendant in the instant case is a county, sovereign immunity is not an issue. See Northern Ins. Co. of New York v. Chatham County, Ga., 547 U.S. 189, 193 (2006) ("[T]his Court has repeatedly refused to extend sovereign immunity to counties."). Vinning-El does not support the defendant's argument.

The defendant also cites two district court decisions, neither of which is persuasive. See Farrow v. Stanley, No. Civ. 02-567-PB, 2005 WL 2671541, at *11 n.13 (D.N.H. Oct. 20, 2005) (unpublished); Boles v. Neet, 402 F. Supp. 2d 1237 (D. Colo. 2005). In Farrow, the court did not decide whether damages were available under RLUIPA. The court commented, in dicta, that "there is substantial uncertainty . . . as to whether this language even provides a right to money

damages." Id. The court then declined to decide the issue because it did not have the benefit of any briefing. Id.

In Boles, the court simply cited Farrow in support of its statement that "it does not appear that the statute permits a claim for damages." Id. at 1241. However, as explained above, Farrow did not decide what remedies are available under RLUIPA. The church respectfully submits that Boles is wrong, and that this Court should follow the lead of the Ninth Circuit, the Eleventh Circuit, and the district courts that have held that RLUIPA permits claims for damages.

III. The church has adequately pled a violation of the Free Exercise Clause.

The church has alleged that defendant's subjective, discretionary, and discriminatory processing of the church's application has substantially burdened the church's exercise of religion. As explained below, these allegations are more than sufficient to state a plausible constitutional free exercise claim.

Defendant acknowledges that free exercise jurisprudence requires strict scrutiny of government actions that (1) substantially burden religious exercise and (2) are either not neutral with respect to religion or are not generally applicable. (Motion at 31-32.) "If a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to achieve a compelling governmental interest." Corder v. Lewis Palmer School Dist. No. 38, 566 F.3d 1219, 1232-33 (10th Cir. 2009); see generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993).

What defendant fails to acknowledge, again, is that strict scrutiny also applies when a government substantially burdens religious exercise by implementing a law—even one that is neutral and generally applicable on its face—in a manner that is not neutral and generally applicable. For example, an "individualized government assessment" or "individualized

exemption" that results in a substantial burden triggers strict scrutiny.[15] See Axson-Flynn v. Johnson, 356 F.3d 1277, 1297-99 (10th Cir. 2004) (applying strict scrutiny to individualized assessment). The Tenth Circuit has held that when determining whether a government's decision-making process involved an individualized assessment, the key question is whether decision was the product of a subjective, case-by-case evaluation or if it was the product of the application of objective rules. See id. at 1928 (holding that individualized exemptions involve "case-by-case determinations"); Grace United Methodist Church, 451 F.3d at 651 (holding that decision to deny church's variance request, which was based on application of objective rule barring daycare centers from residential area, was not an individualized assessment).

Subjective, discretionary decisions about whether to permit the development of land for religious purposes constitute individualized assessments. "[T]he free exercise clause prohibits local governments from making discretionary (i.e., not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest." Al-Salam Mosque Found. v. City of Palos Heights, No. 00-C-4596, 2001 WL 204772, at * 2 (N. D. Ill. Mar. 1, 2001); see also Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 885 (D. Md. 1996) (recognizing that landmark ordinance involved a "system of individualized exemptions"); Alpine Christian Fellowship v. County Commissioners of Pitkin County, 870 F. Supp. 991, 994-95 (D. Colo. 1994) (holding that denial of special use permit triggered strict scrutiny because decision was discretionary).

Defendant's denial of the UDV's application is just such an individualized assessment. Indeed, defendant's decision rested in significant part on defendant's finding that the proposed temple is not compatible with the neighborhood. (Compl. ¶ 101.) This finding is not based on any objective standard. The applicable code provision simply requires that the use be "compatible with existing development in the area." Santa Fe County Land Use Code 7.1.2.

[15] The terms "individualized assessment" and "individualized exemption" have the same meaning. See Lukumi, 508 U.S. at 537; Smith, 494 U.S. at 884.

This is entirely subjective, as illustrated by the disagreement among those who applied it to the UDV's application. Defendant's land use staff, defendant's development committee, and two of the five members of the County Commission concluded that the temple was compatible with the neighborhood, but three members of the County Commission reached the opposite conclusion. (Compl., ¶¶ 75-78, 89, 90, 95.) That the denial was the product of an individualized assessment is sufficient to defeat the motion to dismiss the church's free exercise claim.

But there are more allegations supporting the UDV's claim that defendant's implementation of its land use code was not neutral and generally applicable. The church has alleged that defendant singled the church out for adverse treatment in the application process, including by imposing requirements found nowhere in the land use code, by amending the relevant provisions of the code after the church submitted its application, and by imposing requirements that had not been imposed on other land users. (Compl. ¶¶ 47-52, 57, 61-64, 68-71, 73-74, 86, 100.) The Tenth Circuit has recognized that such facts may establish that a land use code was not applied neutrally. See RMCC, 613 F.3d at 1237 (holding that evidence of "non-neutral" application of land use code included evidence that "the County singled out the Church for adverse treatment in 'processing' and 'determining' its application").

In addition, the church has alleged that defendant violated "the principle of general applicability" because some of "the secular ends" defendant claimed to be advancing by denying the UDV's application "were pursued only with respect to conduct motivated by religious belief." Church of the Lukumi Babalu Aye, 508 U.S. at 524. For example, defendant made findings about the risks that defendant claims are associated with church members driving after consuming their sacrament. The church has alleged that there are no such risks, as no church member has ever been involved in an accident after a religious ceremony in eighteen years. (Compl. ¶ 102.) But even assuming—solely for the sake of argument and contrary to the facts—that there was some risk, it would not be unique to the church. In just six years, drunk driving caused over 1,300 car crashes in Santa Fe County, some of which killed and injured people.

(Id.) Yet defendant grants development permits to bars and restaurants that sell alcoholic beverages, even though some of their patrons drive drunk, including in residential neighborhoods. (Id.) Another example of selective pursuit of interests is the defendant's decision to prohibit the UDV from holding its religious services in what defendant characterizes as a residential, agricultural area, while permitting many non-residential, non-agricultural uses in similar areas. (Id. ¶ 101.) These examples show that defendant only sought to advance its purported interests by prohibiting the church's religiously-motivated conduct, while permitting activities that undermined those same interests.

Finally, although anti-religious motive is not necessary to trigger strict scrutiny, the UDV has alleged facts that support an inference that one of defendant's motives was bigotry. The most obvious example is defendant's finding that granting the church's application could transform Santa Fe County into "a mecca for drug use." (Id. ¶ 107.) This finding indicates that defendant denied the church's application because it disapproves of the church's religious beliefs and practices. Defendant's disapprobation might be the reason why, during the past two decades, defendant has approved every application submitted by a religious organization except for one: the UDV's. (Id. ¶¶ 104, 105.)

The church's allegations are more than sufficient to state a plausible free exercise claim. Because defendant cannot prove its affirmative defense—satisfaction of strict scrutiny—at this juncture, the Court should not dismiss this claim.

IV. The church has adequately pled its unconstitutional disparate treatment claim.

"The fullest realization of true religious liberty requires that government ... effect no favoritism among sects . . . and that it work deterrence of no religious belief." School Dist. of Abington Tp. v. Schempp, 374 U.S. 203, 305 (1963). This neutrality principle lies at the very core of the First Amendment's religious guarantees. "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over

nonadherents." Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994) (internal citations omitted). If the purpose or effect of a law is to discriminate invidiously between religions, that law is constitutionally invalid. Braunfeld v. Brown, 366 U.S. 599, 607 (1961). The Supreme Court has held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," and that when a law grants a denominational preference, "our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." Larson v. Valente, 456 U.S. 228, 244, 246 (1982). In order to withstand strict scrutiny, the Court held that the governmental preference of one religion over another must be "closely fitted" to further a compelling governmental interest. Id. at 247.

Whether the church was treated disparately in violation of the First and Fourteenth Amendments is a fact-driven inquiry that should be made at a later stage based on the evidence. At this stage, to plead a disparate treatment claim for the purposes of Rule 12(b)(6), the church must only allege facts sufficient to show that it was selectively and unfavorably treated as compared to other religious organizations and that the selective treatment was based the impermissible consideration of the church's religion. The church may allege circumstantial evidence to show unlawful purpose, since "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Vill. of Arlington Heights, 429 U.S. at 266.

As we have explained above, the UDV has alleged the facts that demonstrate disparate treatment as well as an impermissible purpose behind the defendant's actions. In addition, as we have also explained above, the church has alleged that defendant has approved facilities for religious use throughout the county, including in predominantly residential neighborhoods without placing the same, onerous requirements that it placed on the UDV. (Compl. ¶ 101.)

Faced with the compelling and specific allegations in the complaint demonstrating disparate treatment, defendant makes the conclusory statement that the church has failed to show

that the comparators are "similarly situated in all material respects." (Motion at 35.) The defendant, however, does not explain what is deficient in the church's complaint and cites no authority to support this proposition. This is because the complaint is not deficient.

V. The church has adequately pled its NMRFRA claims.

A. The Court need not define all of the contours of NMRFRA.

Defendant argues that the Court should dismiss all three of the church's NMRFRA claims because NMRFRA and RLUIPA afford religious adherents identical protections and because the church has not adequately pled its RLUIPA claims. (Motion at 35–36.) The church does not agree that the statutes are identical, as we explain below. However, assuming for the sake of argument only that no difference exists between NMRFRA and RLUIPA, the Court should deny defendant's motion with respect to NMRFRA for the same reasons that it should deny the motion with respect to RLUIPA. The Court may dispose of defendant's motion to dismiss without deciding whether NMRFRA affords greater protection than RLUIPA, unless the Court determines that the church's RLUIPA claims are not plausible.

B. NMRFRA affords even greater protection than RLUIPA and federal constitutional law.

NMRFRA states that it grants protection to the free exercise of religion "in addition to the protections granted by federal law and the state and federal constitutions."[16] NMSA 1978, § 28-22-5 (2000)." (Compl., Doc. 1, ¶¶ 144, 152, 159.) Not surprisingly, then, the substantive language of NMRFRA differs from the language in RLUIPA and the language in First Amendment free exercise cases:

[16] Defendant relies on New Mexico law governing the preservation of state constitutional claims for appeal. (Motion at 36.). This is not an issue, and the church has not made any state constitutional claims.

> A government agency shall not restrict a person's free exercise of religion unless:
>
> A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and
>
> B. the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

NMSA 1978, § 28-22-3 (2000) (emphases added). RLUIPA and the Free Exercise Clause prohibit a government entity from imposing a "substantial burden," unless the government can make a showing sufficient to satisfy strict scrutiny. By contrast, NMRFRA prohibits a government agency from acting to "restrict" the exercise of religion, unless the government can make the demanding showing necessary to justify the "restriction."[17] NMSA 1978, § 28-22-3 (2000). NMRFRA does not define "restrict" or "restriction," and counsel for the church have not found any judicial decisions defining or applying those terms.

When discerning the intent of the New Mexico Legislature, the Court should "look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." City of Albuquerque v. Montoya, 2012-NMSC-007, ¶ 12, 274 P.3d 108 (2012). Black's Law Dictionary defines "restriction," in relevant part, as "a limitation or qualification" or "[a] limitation (esp. in a deed) placed on the use or enjoyment of property." Black's Law Dictionary (8th ed. 2004). These definitions confirm that the Legislature intended for NMRFRA to expand the protection of religious exercise in New Mexico. NMRFRA prohibits any limitation on religious exercise generally or on the religious use or enjoyment of property, even if the limitation does not impose a "substantial burden."

The UDV has alleged facts sufficient to state a claim that defendant limited the church's

[17] A claimant does not need to show "substantial burden" to make discrimination claims under RLUIPA. But a claimant must show a "restriction" to make discrimination claims under NMRFRA.

religious exercise by denying its application to build a temple. We have described these limitations in Section II(B)(2).

NMRFRA prohibits such restrictions on religious exercise, unless: (A) "the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions"; and (B) "the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." NMSA 1978, § 28-22-3 (2000). NMRFRA does not explicitly assign to the government the burdens of persuasion and production as to these elements. But the stated purpose of NMRFRA—to provide protection over and above existing law—and the structure of this section of the statute suggest that these are the required elements of an affirmative defense, which the government bears the burden of establishing. After all, RLUIPA itself and free exercise jurisprudence already place the burden on the government agency to prove least restrictive means and compelling interest. It is unlikely that the New Mexico Legislature, sub silentio, intended to shift the burden to the religious adherent. The government agency must have the burden as to least restrictive means and compelling interest under NMRFRA. And the structure of NMRFRA suggests that the Legislature also intended to require the government agency to show that the restriction is generally applicable and not discriminatory. The exact language precedes both subsection (A), which sets out the compelling interest/least restrictive means defense, and subsection (B), which includes the general applicability and non-discrimination language.

However, at this juncture, the Court need not determine whether the church is correct that defendant bears the burden of establishing general applicability and non-discrimination. Even assuming for the sake of argument that the church must plead facts sufficient to state a claim that the restriction did not result from a rule of general applicability and that defendant discriminated against the church, the UDV has done so for all of the reasons set forth above in Sections IIC and IID (discriminatory) and Section III (not generally applicable).

CONCLUSION

For these reasons, the church respectfully requests that the Court deny defendant's motion to dismiss. If the Court chooses to consider defendant's exhibits for the truth of the matters contained therein and converts defendant's motion to dismiss to a motion for summary judgment, the church respectfully requests that the Court notify the parties, require defendant to conform its motion to Local Rule 56.1(b), and afford the church an opportunity to present the evidence it has and will present at trial to dispute defendant's assertions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2012, I filed the foregoing pleading electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the notice of electronic filing.

s/ Zachary A. Ives
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