

No. 09-15422

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTRO FAMILIAR CRISTIANO BUENAS NUEVAS,
JORGE OROZCO

Plaintiffs-Appellants

v.

THE CITY OF YUMA,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING APPELLANT AND URGING REVERSAL

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STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether Yuma's zoning code, which permits secular membership organizations to locate in the City's Old Town District as a matter of right, but requires membership organizations of a religious nature to obtain a conditional use permit, violates the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc(b)(1).

**IDENTITY AND INTEREST OF THE AMICUS CURIAE AND
THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF**

This case concerns the interpretation of the equal terms provision of

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RLUIPA. The Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and therefore has an interest in how courts construe the statute. The United States has filed amicus briefs addressing the equal terms provision in three other appeals: *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007), cert. denied, 128 S. Ct. 2503 (2008); *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007); and *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005). The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

1. *Factual Background*

Plaintiff Centro Familiar Cristiano Buenas Nuevas (the Church) is a Christian church founded by its senior pastor, plaintiff Jorge Orozco. E.R. 476, 553.¹ At the start of this litigation, the Church had approximately 250 members and held its services and meetings in a leased facility in Yuma, Arizona. E.R. 476, 553, 555. The Church believed that this facility did not have sufficient room for it to hold a worship service for its entire congregation, carry out full-immersion baptisms, or conduct religious instruction and other ministries it considered essential to its mission. E.R. 476, 555-556. To accommodate its existing members and potential future members, the Church searched for a larger facility to

¹ References to “E.R. ___” are to pages in appellants’ Excerpts of Record; references to “Appellants’ Br. ___” are to pages in appellants’ opening brief.

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serve as its permanent location. E.R. 476. The search culminated in the March 2007 purchase of a building at 354 South Main Street in downtown Yuma. E.R. 484.

The Main Street building the Church purchased is in the Old Town District, whose development is subject to the City's zoning code. According to the code,

[t]he Old Town (OT) District is intended to be a retail, business, and government center with a special emphasis on tourism and historic preservation, due to the unique qualities present in the Old Town (OT) District that set it apart from all other districts in the city. In this district, commercial establishments are intended to serve the residents of the city, as well as visitors to the area. The priority of this district is to establish and support a mixture of commercial, cultural, governmental, and residential uses that will help to ensure a lively pedestrian-oriented district.

E.R. 574 (Yuma City Code § 154-185).²

The City's code permits a variety of uses as of right in the Old Town District, including "[m]embership organizations (except religious organizations (SIC 86))."³ E.R. 576 (Yuma City Code § 154-187(XX)). In addition to secular membership organizations, the City's zoning code allows more than 60 categories of organizations and entities to operate in the Old Town District as of right,

² The Yuma City Code (unofficial version) is available at http://www.amlegal.com/yuma_az/ (last visited August 7, 2009). See Addendum to this Brief.

³ "SIC" refers to the Standard Industrial Classification Manual, a publication of the Office of Management and Budget that the federal government previously used to classify establishments for statistical purposes. E.R. 3. The SIC has been replaced by the North American Industry Classification System (NAICS). See <http://www.census.gov/eos/www/naics/> (last visited August 7, 2009).

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including membership-based lodging, rooming and boarding houses, motion picture theaters, amusement and recreation services, social service agencies, and “[c]orrection centers.” E.R. 574-578 (Yuma City Code § 154-187). Under the City’s zoning code, entities such as the Fraternal Order of Eagles and a Masonic Temple have been allowed to locate in the Old Town District as of right. See Appellant’s Br. 4; E.R. 481.

Other organizations and institutions are permitted in the Old Town District only if they obtain a conditional use permit (CUP) from the City’s Planning and Zoning Commission.⁴ E.R. 578-579 (Yuma City Code §§ 154-188, 154-495). These entities include religious organizations, educational services, and job training and vocational rehabilitation services. E.R. 578 (Yuma City Code § 154-188).

The zoning code defines “[m]embership organization” and “[r]eligious organization” solely by reference to the SIC. E.R. 576 (Yuma City Code § 154-

⁴ A CUP is a permit designed “to allow approval of uses which are deemed to possess location, use, building, or traffic characteristics of such unique, and special, form as to make impractical, or undesirable, their automatic inclusion as permitted uses in certain districts.” E.R. 579 (Yuma City Code § 154-495). The Planning and Zoning Commission possesses authority to grant approval for conditional uses. E.R. 579 (Yuma City Code § 154-495). To obtain a CUP, a party must file a written application with the Planning and Neighborhood Services Division of the Commission, specifying the conditional use requested and the reasons for granting the application, and including plans and other pertinent information. Yuma City Code § 154-499. The Commission must hold a public hearing on the CUP application, for which it must give notice to, *inter alia*, owners of property within 300 feet of the subject property. Yuma City Code § 154-500.

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187(XX) (citing SIC 86)), E.R. 578 (Yuma City Code § 154-188(F) (citing SIC 8661)). According to the SIC, “membership organizations” include “trade associations; professional membership organizations; labor unions and similar labor organizations; and political and *religious organizations*.” SIC 86, *available at* http://www.osha.gov/pls/imis/sic_manual.html (follow “Major Group 86: Membership Organizations” hyperlink) (last visited August 7, 2009) (emphasis added). Of these, the only membership organizations that Yuma does not allow to operate as of right in the Old Town District are those that are religious in nature. The SIC defines “religious organizations” as “[e]stablishments of religious organizations operated for worship, religious training or study, government or administration of an organized religion, or for promotion of religious activities.” SIC 8661, *available at* http://www.osha.gov/pls/imis/sic_manual.html (follow “Major Group 86: Membership Organizations” hyperlink; then follow “Religious Organizations” hyperlink) (last visited August 7, 2009). The SIC further provides that “[o]ther establishments maintained by religious organizations, such as educational institutions, hospitals, publishing houses, reading rooms, social services, and secondhand stores, are classified [under the SIC] according to their primary activity.” *Ibid.*

The Church, which was aware of the CUP requirement when it purchased the property, applied for a CUP in March 2007. E.R. 484, 559. The Church proposed to use its property for church services, music and dance lessons, counseling, Summer Bible Camp, General Educational Development (GED)

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classes, English classes, and computer classes. E.R. 315.

Arizona law prohibits the issuance of new liquor licenses to businesses within 300 feet of a church or certain types of schools. Ariz. Rev. Stat. Ann. § 4-207(A) (2009). It does not prohibit the renewal of valid licenses that were issued when the premises were not within 300 feet of a church. *Ibid.* Exempt from the restriction on liquor licensing are, *inter alia*, restaurants, hotels, and special events. *Id.* § 4-207(B). The Arizona statute does not contain a provision expressly allowing a church to waive enforcement of the licensing restrictions. No liquor stores or bars have applied to locate within 300 feet of the Church's property in the last two years. E.R. 488.

In July 2007, the City's Planning and Zoning Commission denied the Church's CUP application. E.R. 488. The Commission gave the following reasons for its denial: (1) the Church's proposed use did not implement the purpose statement of the Old Town District set forth in Yuma's zoning code; (2) the proposed use did not conform to the City's redevelopment plan for the downtown area; (3) the Church's presence would conflict with the City's vision of Main Street as a cultural, retail, recreational, and entertainment hub for the north end of the City; and (4) state law limiting the issuance of new liquor licenses to stores or bars located within 300 feet of a church could frustrate the City's goals for Main Street. E.R. 488. In December 2007, the Yuma City Council voted against reconsidering the Commission's decision. E.R. 488.

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2. *Proceedings Below*

On May 28, 2008, the Church and Pastor Orozco filed suit in federal court against the City of Yuma. The complaint alleged that the City's zoning code, both on its face and as applied, violated RLUIPA, the First Amendment rights to free exercise of religion and freedom of speech, the Fourteenth Amendment rights to due process and equal protection, and the right to free exercise of religion under Arizona law. E.R. 563-568. The Church moved for a preliminary injunction against the City. E.R. 1. The parties agreed to consolidate the Church's motion with a bench trial on the merits, and stipulated to many of the facts. E.R. 1.

After a bench trial, the district court entered judgment for the City on all claims. As relevant here, the district court held that Yuma's zoning code does not, on its face, violate RLUIPA's equal terms provision. The court first determined that plaintiffs presented prima facie evidence of an equal terms violation by showing that the zoning code permitted secular membership organizations to operate as of right in the Old Town District but allowed religious organizations to locate there only if they obtained a CUP. E.R. 23. The court then placed the burden on the City to show that a neutral and generally applicable principle justified treating some secular organizations better than religious organizations. E.R. 23-24. The court determined that the City satisfied this burden because it was motivated by the "neutral desire" to develop the Old Town District and the Main Street area as a "tourism, entertainment, and retail area," and that "[a]llowing religious organizations to locate on Main Street as a matter of right would derail

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that plan.” E.R. 25, 27.

The court distinguished religious membership organizations from secular ones on two grounds. First, the court asserted that religious organizations often engage in “accessory uses”⁵ of their property, and that the Church had proposed to do so by offering GED, English, and computer classes. E.R. 24. The court noted that, if the Church undertook such activities as part of its religious mission, the City might have to allow those accessory uses if it permitted the Church in the Old Town District as of right, even though such uses might fall under the job training category and trigger the CUP requirement if pursued independently. E.R. 24-25. Next, the court concluded that, because Arizona law restricts the issuance of liquor licenses within 300 feet of religious organizations, allowing the Church to operate in its desired location would prevent “new bars, breweries, wine bars, clubs, [and] liquor stores” from opening on Main Street in contravention of the City’s redevelopment plan. E.R. 25. The court asserted that these concerns about accessory uses and alcohol licensing are not implicated by secular membership organizations, which are permitted in the Old Town District as of right, because such organizations neither trigger restrictions on alcohol licensing nor “customarily engage in wide-ranging accessory uses.” E.R. 27. The court concluded that “[t]he City was not targeting religious organizations because of their religious

⁵ The Yuma City Code defines an “accessory use” as “[a]ny use which serves a principal use or building and is subordinate to the principal use or building in terms of either area, extent or purpose.” Yuma City Code § 154-004.

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motivations, and it did not pursue its interests only against religious organizations.” E.R. 27.

The court also held that the City’s denial of a CUP to the Church did not violate RLUIPA’s equal terms provision. At the outset, the court determined that plaintiffs had produced prima facie evidence of an equal terms violation by showing that the City allowed some secular assemblies and institutions to locate in the Old Town District while denying a CUP to the Church. E.R. 23. The court nevertheless rejected the Church’s challenge on the ground that the City based its denial of the CUP upon neutral and generally applicable principles. E.R. 27-28. In this regard, the court first noted that the secular assemblies and institutions that exist on Main Street – “a movie theater, an art center and theater, a dance hall and studio, and a fitness center” – all fit the “City’s goal of creating a tourism, entertainment, and retail corridor.” E.R. 27-28. The court placed considerable emphasis on the “fact” that “[t]he City has not approved CUP applications from other churches, educational services, or job training services to locate on or near Main Street.” E.R. 28. According to the court, “the City declined to support the Yuma Reading Council, United Way, Parents Anonymous, and Big Brothers Big Sisters when those organizations offered to purchase and renovate the very same property * * * for use in their community work.”⁶ E.R. 28; see E.R. 7. In

⁶ The court implies in this passage that those organizations are similarly situated to the Church, in that they were required to apply for a CUP for the building, and that their application was refused. The document on which the

(continued...)

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addition, the court pointed to the report prepared by the staff of the Planning and Zoning Commission, which asserted that the Church would have a negative impact on neighboring property values, particularly because of the restrictions on liquor licenses. E.R. 28.

Finally, the district court rejected the Church's other statutory and constitutional claims. The court concluded that the City's denial of the CUP did not impose a substantial burden on the Church's religious exercise, and thus did not violate 42 U.S.C. 2000cc(a). E.R. 10-16. Based upon its finding that the zoning code's CUP requirement was neutral and generally applicable, the court concluded that the requirement did not violate the Free Exercise Clause or Free Speech Clause of the First Amendment, did not run afoul of the Arizona Religious Freedom Restoration Act, and survived rational basis review under the Equal Protection Clause of the Fourteenth Amendment. E.R. 30-31. The court also concluded that the City's denial of the CUP did not violate the Church's right to

⁶(...continued)

district court relies for the quoted statement does not, however, support the implication. The court based its assertion on an e-mail submitted as one of the public comments on the Church's CUP application. The e-mail was written by a person who purported to be affiliated with one of the other groups. See E.R. 7, 371. However, the e-mail does not explain what is meant by the author's assertion that "the city wouldn't support us" when the group sought to buy the building (E.R. 371), and thus, there is no basis on which to conclude that the organizations were required to apply for a CUP. In any event, if those organizations were required to apply for a CUP, it presumably was because they were not considered membership organizations under the City's zoning code. The Church, on the other hand, is a membership organization, that, but for its religious mission, would be permitted to locate on Main Street without needing to apply for a CUP.

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free association. E.R. 31.

SUMMARY OF ARGUMENT

Yuma's zoning code violates RLUIPA's equal terms provision.⁷ Section 2(b)(1) of RLUIPA prohibits a municipality's land use regulations from treating "a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1). Yuma's zoning code requires religious membership organizations to acquire a conditional use permit before locating in the City's Old Town District, but permits secular membership organizations to locate there as of right. As the district court correctly recognized, this differential treatment of religious and secular membership organizations constituted a prima facie violation of RLUIPA. The burden thus shifted to the City to show that religious membership organizations are more likely than secular membership organizations to interfere with the City's legitimate land-use interests in the Old Town District. See 42 U.S.C. 2000cc-2(b).

The district court erred in holding that the City satisfied that burden. First, the City cannot rely on Arizona's liquor-licensing statute to justify treating religious membership organizations less favorably than secular membership organizations. The harm that the City allegedly is trying to prevent by requiring religious organizations to obtain a CUP – the limitation on new bars and liquor

⁷ The United States takes no position on the merits of plaintiffs' other claims under RLUIPA, the United States Constitution, or the Arizona Religious Freedom Restoration Act.

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stores within 300 feet of a church – is due to the state law, not the activities of the Church. So long as the Church agrees not to invoke the protections of the state law, it should be treated on the same terms as similarly situated secular organizations. The fact that the state liquor-licensing law was enacted to favor churches is irrelevant, as RLUIPA forbids unequal treatment of religious organizations without regard to the motivations of the legislature.

Second, the City cannot rely upon the possibility of accessory uses by religious organizations to justify the zoning code’s differential treatment of religious and secular membership organizations. If the City wants to regulate accessory uses, it can do so directly through a neutral permitting process that applies evenhandedly to both religious and secular membership organizations. Moreover, the district court’s assumption that religious organizations are more likely than secular organizations to engage in accessory uses is questionable. Finally, the City has not explained how the types of accessory uses the Church has proposed (GED, English and computer classes) would undermine the goal of making the Old Town District a “lively pedestrian-oriented district” (E.R. 574 (Yuma City Code § 154-185)), given that those classes may, in fact, increase foot traffic along Main Street.

ARGUMENT

YUMA’S ZONING CODE VIOLATES RLUIPA’S “EQUAL TERMS” PROVISION

Section 2(b)(1) of RLUIPA states that “[n]o government shall impose or

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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). This provision merely codifies existing constitutional protections against religious discrimination by prohibiting governments from treating religious assemblies “on less than equal terms,” *ibid.*, with nonreligious assemblies or institutions. See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007), cert. denied, 128 S. Ct. 2503 (2008); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005). “It is undisputed that, when drafting the Equal Terms provision, Congress intended to codify the existing jurisprudence interpreting the Free Exercise Clause.” *Lighthouse*, 510 F.3d at 264; see 146 Cong. Rec. S7774-S7776 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (RLUIPA sections 2(b)(1) and 2(b)(2) “enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable”). “The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-543 (1993) (internal quotation marks, brackets, and citation omitted). In other words, when the government permits secular exemptions to otherwise generally applicable government regulations, the Free Exercise Clause requires that the government accord equal treatment to

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religion-based claims for exemptions that would cause no greater harm to its interests than the secular exemptions that are already allowed. See *id.* at 545.

RLUIPA's equal terms provision codifies this constitutional standard. Therefore, a violation occurs under RLUIPA Section 2(b)(1) if religious assemblies or institutions are treated less well than secular assemblies or institutions that are comparable with respect to the legitimate land-use interests the zoning rule is designed to serve. See *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) ("The equal-terms section is violated whenever religious land uses are treated worse than comparable nonreligious ones."). To prevail on an equal-terms claim, a plaintiff need not identify a secular comparator that is similar in *all* respects to the religious assembly or institution. *Lighthouse*, 510 F.3d at 264. Instead, the relevant inquiry is whether the religious entity and its secular counterpart are comparable in the sense that they would have a similar impact on the defendant's legitimate land-use interests. *Id.* at 265. This standard does not require preferential treatment vis-à-vis secular organizations when it comes to zoning; it merely prohibits discriminatory treatment. The district court failed to properly apply this standard in analyzing Yuma's zoning ordinance.

Yuma's zoning code violates RLUIPA's equal terms provision. The code requires religious membership organizations to obtain a conditional use permit before operating in the Old Town District, but allows secular membership organizations to operate in that district as of right. The membership organizations

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that are allowed to operate as of right include “trade associations; professional membership organizations; labor unions and similar labor organizations; and political * * * organizations.” SIC 86, *available at* http://www.osha.gov/pls/imis/sic_manual.html (follow “Major Group 86: Membership Organizations” hyperlink) (last visited August 7, 2009). The only membership organizations that Yuma does not allow to operate as of right in the Old Town District are those that are religious in nature. By allowing “[m]embership organizations (except religious organizations (SIC 86))” (E.R. 576 (Yuma City Code § 154-187(XX))) to operate as of right in the Old Town District, the zoning code treats religious assemblies and institutions less favorably than their secular counterparts.

The district court correctly recognized that the zoning code’s differential treatment establishes a prima facie violation of RLUIPA and shifts the burden to the City, see 42 U.S.C. 2000cc-2(b), to show that religious membership organizations are more likely than secular membership organizations to interfere with the City’s zoning interests in the Old Town District. E.R. 23. The court incorrectly concluded, however, that the City met this burden.

The district court concluded that the City “was guided by the neutral desire to redevelop the Old Town District in general, and Main Street in particular[,] as a tourism, entertainment, and retail area.” E.R. 27. According to the court, religious membership organizations impede this goal in two ways that secular membership organizations do not. First, the court noted that churches, but not secular

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membership organizations, trigger state-law restrictions on the issuance of liquor licenses. E.R. 25-27. Second, the court asserted that religious organizations often engage in wide-ranging accessory uses that their secular counterparts do not, and that allowing religious organizations to locate as of right in the Old Town District might force the City to permit accessory uses that would otherwise require a CUP. E.R. 24-25, 27.

Neither rationale justifies the distinction that Yuma's zoning code makes between religious membership organizations and their secular counterparts. First, the Arizona liquor-licensing statute does not warrant this differential treatment. With limited exceptions (most notably for hotels and restaurants), the state statute prohibits the issuance of new liquor licenses to businesses within 300 feet of a church. Ariz. Rev. Stat. Ann. § 4-207(A) (2009). Yuma contends that this restriction on liquor licenses on Main Street would conflict with the City's plan for the Old Town District, namely "to establish and support a mixture of commercial, cultural, governmental, and residential uses that will help to ensure a lively pedestrian-oriented district." E.R. 574 (Yuma City Code § 154-185).

Although barring liquor licenses for nearby businesses might interfere with the City's goal of creating a lively entertainment area in the Old Town District, the City cannot use the state law as an excuse to treat religious organizations less favorably than secular membership organizations. The harm the zoning code is allegedly attempting to prevent by requiring the Church to seek a CUP – the limitation on new bars and liquor stores located within 300 feet of the Church – is

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attributable to state law rather than to the activities of the Church.

Yuma's argument in this regard is virtually identical to the one that the Seventh Circuit properly rejected in *Digrugilliers*. In that case, Indianapolis argued that an Indiana liquor law similar to Arizona's justified a zoning distinction between churches and secular assemblies, and thus provided a defense to an equal terms claim under RLUIPA. Addressing the Indiana statute, the Seventh Circuit held that "[g]overnment cannot, by granting churches special privileges ([namely,] the right of * * * the church to be free from offensive land uses in its vicinity), furnish the premise for excluding churches from otherwise suitable districts." *Digrugilliers*, 506 F.3d at 616. The court found it "irrelevant" that the liquor-licensing law had been enacted by the state, rather than by the municipality that was being sued under RLUIPA. *Id.* at 617. Emphasizing that "[t]he City is part of the government of Indiana," the Seventh Circuit held that "a state cannot be permitted to discriminate against a religious land use by a two-step process in which the state's discriminating in favor of religion becomes a predicate for one of the state's subordinate governmental units to discriminate against a religious organization in violation of federal law." *Ibid.* Cf. *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (holding that a policy allegedly motivated by a desire to protect women cannot be used to justify discrimination against them); *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (same). For the reasons that the Seventh Circuit rejected Indianapolis's reliance on a state liquor licensing law, this Court should likewise reject Yuma's argument.

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Contrary to the district court's belief, allowing the Church to locate on Main Street as of right need not conflict with the City's desire to revitalize and redevelop that street into a tourist, entertainment, and retail center for the City. RLUIPA's equal terms provision requires *equal*, not *preferential*, treatment. See, e.g., *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1313 (11th Cir. 2006). Therefore, if the Church wishes to operate in the Old Town District on the same terms as a secular membership organization, it cannot be heard to complain that liquor stores and bars are in its immediate vicinity. In fact, at trial, the Church's attorney stated that the Church did not have a problem with alcohol vendors within 300 feet of its property. See E.R. 295-296. Accordingly, RLUIPA's equal terms provision would not prohibit the City or State from requiring, as a condition of operating in the Main Street location, that the Church agree not to invoke the protections of the 300-foot restriction. So long as the Church is willing to abide by this condition, it should be treated the same as similarly situated secular organizations under RLUIPA.

We acknowledge that Arizona's liquor licensing statute contains no provision expressly authorizing a waiver of the 300-foot requirement. And it is unclear whether Arizona courts or the state's Department of Liquor Licensing and Control⁸ would interpret the statute to permit a waiver of the distance requirement where, as here, a religious organization invokes its federal rights to be treated on

⁸ This state agency administers the liquor licensing statute. See Ariz. Rev. Stat. Ann. §§ 4-111, 4-112 (2009).

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equal terms with secular organizations. But even if Arizona law were construed to prohibit a waiver of the 300-foot rule, that law could not justify Yuma's failure to accord the Church the equal treatment required by RLUIPA. As the Seventh Circuit correctly concluded, a state liquor licensing law cannot be used by a municipality to deny religious organizations the equal treatment that RLUIPA demands. See *Digrugilliers*, 506 F.3d at 616.

Instead of following the Seventh Circuit's holding in *Digrugilliers*, the district court relied on the Third Circuit's decision in *Lighthouse*. E.R. 26. The *Lighthouse* court held that a city's redevelopment plan, which allowed some secular assemblies in a certain district, but not churches or synagogues, did not violate RLUIPA's equal terms provision. The court accepted the municipality's argument that, because of a New Jersey law restricting liquor licenses within 200 feet of a church, religious assemblies and secular assemblies were not similarly situated with regard to their impact on the city's goal of encouraging development of a lively entertainment district. *Lighthouse*, 510 F.3d at 270-271. Declining to follow *Digrugilliers*, the Third Circuit emphasized that New Jersey enacted the statute not to discriminate against churches, but to favor them, and that the law also applied to certain schools. *Id.* at 271 n.15.

The holding of *Digrugilliers*, not that of *Lighthouse*, is most consistent with RLUIPA. Under the Third Circuit's logic, a church may have a claim under the equal terms provision if it can show that the state had discriminatory rather than laudatory motives in prohibiting alcohol sales within a certain vicinity of a church.

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Contrary to the Third Circuit's assertion, the fact that a liquor-licensing statute was enacted to favor churches is irrelevant. The equal terms provision prohibits lesser treatment of religious organizations that are comparable to secular organizations, and says nothing about the motivations of the legislature. Regardless of the motivations behind a state liquor law, it cannot be used to justify unequal treatment of otherwise comparable secular and religious assemblies.

The district court attempted to distinguish *Digrugilliers* on the ground that, unlike Indianapolis, Yuma "has not sought to exclude religious organizations altogether." E.R. 26. "Rather," the district court asserted, Yuma "seeks to include them in the Old Town District in a manner consistent with its plan" through use of the CUP requirement. E.R. 26. This effort to distinguish *Digrugilliers* is unpersuasive. RLUIPA Section 2(b)(1) prohibits unequal treatment of similarly situated religious and secular assemblies; the language of the equal terms provision draws no distinction between (1) unequal treatment that results in a complete exclusion of religious organizations from an area and (2) unequal treatment that imposes special burdens on religious organizations but does not categorically exclude them.

The other justification on which the district court relied was the concern that religious organizations would be more likely than secular membership organizations to engage in "accessory uses" that might conflict with surrounding properties. This justification for blanket differential treatment is unpersuasive for a number of reasons.

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First, if accessory uses are a concern, the City should regulate them directly and equally for both religious and secular membership organizations. An accessory use conducted by a religious membership organization has no greater effect on the City's zoning interests than would the same accessory use by a secular membership organization. See *Lighthouse*, 510 F.3d at 272-273 (finding that an ordinance allowing a secular assembly hall but prohibiting a church violated RLUIPA's equal terms provision because it was not apparent why the church would cause greater harm to regulatory objectives than would the assembly hall). RLUIPA's equal terms provision does not forbid the City from using an even-handed permitting process to directly regulate accessory uses of both religious and secular membership organizations. To comply with RLUIPA, however, that permitting process must be designed to target the use of land for prohibited accessory activities, and should not be aimed at forbidding religious entities from using the land altogether.

Second, the district court's assumption that religious organizations are more likely than secular organizations to engage in accessory uses is questionable. To support its assumption, the court emphasized that the Church in this case proposed to offer GED, English, and computer classes, "which could be job training services that would trigger the zoning code's CUP requirement if pursued independently." E.R. 24. However, some secular membership organizations offer similar services. See, e.g., Somali Bantu Association of Tucson, Arizona, *available at* <http://www.sbata.org/Services.html> (last visited August 7, 2009) (noting that its

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services include computer classes, citizenship classes, budgeting classes, and English language tutoring). The court also pointed to the SIC, which notes that religious organizations sometimes maintain “educational institutions, hospitals, publishing houses, reading rooms, social services, second hand stores, and radio and television stations.” E.R. 24. But the court ignored the fact that the same SIC provision explains that establishments maintained by religious organizations “are classified according to their primary activity.” SIC 8661, *available at* http://www.osha.gov/pls/imis/sic_manual.html (follow “Major Group 86: Membership Organizations” hyperlink; then follow “Religious Organizations” hyperlink) (last visited August 7, 2009). Thus, for example, if a religious organization operates a hospital, SIC classifies it as a hospital, not a religious organization. See SIC 8062, *available at* http://www.osha.gov/pls/imis/sic_manual.html (follow “Major Group 80: Health Services” hyperlink; then follow “General Medical and Surgical Hospitals” hyperlink) (last visited August 7, 2009). Again, if the City is concerned about accessory uses, it should regulate them directly and apply the same restrictions to secular organizations.

Third, the City has not explained how the types of accessory uses the Church has proposed (GED, English and computer classes) would undermine the goal of making the Old Town District a “lively pedestrian-oriented district.” E.R. 574 (Yuma City Code § 154-185). The district court accepted this argument, finding that if the Church were able to locate in the Old Town District as of right,

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the City might have to allow these proposed uses, which “would pose conflicts with surrounding entertainment and retail uses, and the district would lose its planned direction.” E.R. 25. The court’s conclusion smacks of stereotyping of religious organizations that RLUIPA was intended to eliminate. See 146 Cong. Rec. at S7774-S7775 (noting that “[c]hurches have been excluded from * * * commercial zones because they don’t generate enough traffic”). If anything, the proposed classes at the Church seem likely to increase foot traffic along Main Street and bring individuals to the area who might patronize restaurants and businesses on their way to and from classes. The Church is thus arguably *more* consistent with the City’s goals for the Old Town District than are secular membership organizations, such as trade associations and labor unions, that may not generate comparable foot traffic yet are allowed to operate in the district as of right.

The arguments that Yuma makes about accessory uses are analogous to those the Seventh Circuit properly rejected in *Digrugilliers*. In that case, the Seventh Circuit addressed a zoning ordinance that defined “religious use” broadly to include “reasonably related accessory uses,” including “educational, instructional, social or residential uses” – a broader range of accessory uses than was permitted for secular assemblies. *Digrugilliers*, 506 F.3d at 614. The district court concluded that, because these accessory uses were not permitted in the zoning district at issue, a church must obtain a variance to locate in that district. *Id.* at 615. Rejecting this logic, the Seventh Circuit held that

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[t]he City may not, by defining religious use so expansively as to bestow on churches in districts in which it allows them to operate more rights than identical secular users of land have, justify excluding churches from districts in which, were it not for those superadded rights, the exclusion would be discriminatory.

Ibid.

As in *Digrugilliers*, the Church in this case cannot demand preferential treatment under the equal terms provision. If Yuma were to restrict accessory uses for secular assemblies in the Old Town District, it could enforce the same limitations against the Church without violating Section 2(b)(1). See *Digrugilliers*, 506 F.3d at 615 (“Whatever restrictions the City imposes on other users of land in C-1 it can impose on the Baptist Church of the West Side without violating the ‘equal terms’ provision.”). What the City may not do is place greater restrictions on accessory uses by religious membership organizations than it imposes on their secular counterparts.

In sum, Yuma’s zoning code violates RLUIPA’s equal terms provision by allowing secular, but not religious, membership organizations to operate as of right in the Old Town District. The City has failed to show that religious membership organizations pose greater harms to the City’s zoning interests in the Old Town District than do the secular membership organizations that are permitted to operate there without obtaining a conditional use permit.

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CONCLUSION

This Court should reverse the district court's ruling that Yuma's zoning code did not violate RLUIPA's equal terms provision.

Respectfully submitted,

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STATEMENT OF RELATED CASES

I state that, pursuant to Circuit Rule 28-2.6, I am not aware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that this BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT AND URGING REVERSAL is proportionately spaced, in 14-point Times New Roman font, and complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). Per WordPerfect X4 software, the brief contains 6,145 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: August 7, 2009

ADDENDUM

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all Residential Zoning Districts:

- (a) Barber shop,
- (b) Beauty parlor,
- (c) Dance studio,
- (d) Electrical repair shop,
- (e) Massage parlor,
- (f) Motor vehicle repairing services,
- (g) Real estate or insurance office,
- (h) Veterinary office and kennels or similar uses,
- (i) Engine repair,
- (j) Furniture refinishing,
- (k) Medical/cosmetic facilities for animals including animal care or boarding facilities,
- (l) Machine shop/ metal working,
- (m) Mortuaries,
- (n) Taxi service with more than one vehicle,
- (o) Commercial insecticide, fungicide, herbicide or rodenticide operators,
- (p) Medical or dental office.

(4) *Limited use home occupations.*

(a) *"Merchandise parties"* (i.e., Tupperware, Avon, Mary Kay, etc.) held for the purpose of soliciting sales shall be limited to no more than one party per month on the site of the home occupation.

(b) *Contracting services.* Contracting services must, in addition to the performance standards listed in § 154-003(J)(2), comply with all of the following additional performance standards:

1. The contracting service is a sole ownership business.
2. The contracting service has no employees other than those living in the home.
3. There are no materials stored on the lot of the residence of the home occupation.
4. There are no more than one, one and one-half ton vehicle associated with the business, parked at the home.
5. The home occupation cannot serve as a headquarters or dispatch center, where employees come to be dispatched to other locations.

(c) *Home occupation disclosure.* Home occupation operators shall complete a Home Occupation Disclosure Form at the time of application of a business license.

('80 Code, App. A, § 30) (Ord. 583, passed 9-16-52; Ord. 2375, passed 9-16-87; Ord. O97-11, passed 3-5-97; Ord. O97-23, passed 9-3-97; Ord. 02000-25, passed 5-3-00; Ord. O2002-30, passed 8-7-02; Ord. O2009-09, passed 2-18-09) Penalty, see § 154-999

§ 154-004 Definitions.

For the purpose of this chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning. Where a land use is presented to the city and it is not defined below, then the presented land use shall be classified to the defined land use to which it is the most reasonably related.

ACCESSIBLE PEDESTRIAN ROUTE. A pedestrian route designed in compliance with the Arizonians with Disabilities Act Accessibility Guidelines (ADAAG).

ACCESSORY BUILDING OR STRUCTURE. An accessory building or structure is one which:

- (1) Is subordinate and incidental to the principal building or principal use; and
- (2) Is subordinate in building area, intensity of use, or purpose to the principal building or principal use; and
- (3) Contributes to the comfort, convenience, and necessity of the occupants of the principal building or principal use; and
- (4) Is located on the same lot with the same zoning as the principal building or principal use.

ACCESSORY USE. Any use which serves a principal use or building and is subordinate to the principal use or building in terms of either area, extent or purpose.

ADULT ARCADE. Any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are regularly maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by their emphasis upon matters exhibiting "specified sexual activities" or "specified anatomical areas."

ADULT BOOKSTORE, ADULT NOVELTY STORE or ADULT VIDEO STORE. A commercial establishment which has as a significant or substantial portion of its stock-in-trade, or derives a significant or substantial portion of its revenues or devotes a significant or substantial portion of its interior business or advertising, or maintains a substantial section of its sales or display space for sale or rental for any form of consideration any one or more of the following:

(1) Books, magazines, periodicals or other printed matter, or photographs, films, computer simulations, holograms, motion pictures, video reproductions, compact discs, slides, or other visual representations which are characterized by their emphasis upon the exhibition or display of "specified sexual activities" or "specified anatomical areas"; or

(2) Instruments, devices, or paraphernalia which are designed for use or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of the user or others.

ADULT CABARET. A nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(1) Persons who appear semi-nude; or

(2) Live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

(3) Films, motion pictures, computer simulations, holograms, video cassettes, slides, or other photographic reproductions, which are characterized by the exhibition or display of "specified sexual activities" or "specified anatomical areas."

ADULT MOTEL. A hotel, motel, or similar commercial establishment which:

(1) Offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, computer simulations, holograms, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the exhibition or display of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right-of-way which advertises the availability of this adult type of photographic reproductions; and, either

(2) Offers a sleeping room for rent for a period of time that is less than ten hours; or

(3) The location of any Transitional District shall be restricted to property which either has direct access to and frontage on a major or minor arterial street as classified by the Transportation Element of the Yuma General Plan, or is contiguous to an existing business or industrial zoning district for a minimum length of 250 feet.

(B) *Building requirements.*

(1) Any use allowed herein, including accessory activities other than parking, shall take place within an enclosed building.

(2) Maximum lot coverage including all covered structures shall not exceed 50%.

(3) Maximum building height shall not exceed three stories or 40 feet, subject to the exceptions as specified in § 154-006 of this chapter.

(C) *Yards.*

(1) All buildings, including accessory structures shall be set back a minimum of 20 feet from any public or private street right-of-way line. A minimum setback of 20 feet shall also be provided from any side or rear property line shared with a residential zoning district, except landscaping for such required setback(s) may be reduced to five feet in width when the transitional property is developed with buildings and/or structures containing no more than 5,000 square feet gross enclosed floor area.

(2) Required yards fronting on a public or private street shall be landscaped as set forth in §§ 154-445 through 154-451 of this chapter and shall not be used for parking, loading, or product display.

(D) *Parking.* Off-street parking shall be provided as specified in §§ 154-395 through 154-403 of this chapter.

(E) *Lighting.* All exterior lighting fixtures shall be arranged and located as to direct the light away from any public or private street right-of-way, or adjoining residential district.

(F) *Signing.* Signing for purposes of identifying any use permitted herein may be provided on the same premises as the use being served, and shall be clearly incidental to such use. All signing shall comply with the following minimum standards:

(1) The maximum area of all signing shall be in accordance with the dimensions specified within the table, Standards and Criteria for Permanent On-Site Signing, contained within § 154-418 of this chapter.

(2) Signing less than three feet in height may be located within the minimum 20 foot setback from any public or private street right-of-way; signing greater than three feet in height shall be subject to the height and setback requirements specified in this section. Any sign location shall be subject to the traffic visibility requirements of this chapter, which shall apply to all driveways and corner lot locations. The upper limit of any sign face shall not extend above the roof line of any building on the property.

(3) Sign illumination may be direct or indirect lighting; provided, however, there shall be no glare to adjoining property or streets. Flashing signs, rotating beacons, portable or moving signs shall be prohibited.

(4) Signing shall be limited to identification purposes only and shall not include any picture, trademark, symbol, structure or other configuration other than the letters comprising the permitted subject matter.

(5) Nothing herein shall prohibit the placing of a temporary real estate sales or rental sign not exceeding three square feet in area within any required yard.

(80 Code, App. A, § 90) (Ord. 583, passed 9-16-52; Ord. 2071, passed 5-5-82; Ord. 2399, passed 4-20-88; Ord. 096-24, passed 3-6-96; Ord. O2000-55, passed 8-2-00; Ord. O2004-52, passed 8-4-04) Penalty. see § 154-999

Old Town District (OT)

§ 154-185 Purpose.

The Old Town (OT) District is intended to be a retail, business, and government center with a special emphasis on tourism and historic preservation, due to the unique qualities present in the Old Town (OT) District that set it apart from all other districts in the city. In this district, commercial establishments are intended to serve the residents of the city, as well as visitors to the area. The priority of this district is to establish and support a mixture of commercial, cultural, governmental, and residential uses that will help to ensure a lively pedestrian-oriented district.

('80 Code, App. A, § 95) (Ord. 583, passed 9-16-52; Ord. O95-073, passed 10-18-95)

§ 154-186 Applicability.

The Old Town (OT) District shall be applicable to those historic downtown business and government centers and surrounding support uses established in the early history of the city.

('80 Code, App. A, § 95) (Ord. 583, passed 9-16-52; Ord. O95-073, passed 10-18-95)

§ 154-187 Principal Permitted Uses.

The following uses as defined in the Standard Industrial Classification Manual (1987), (Executive Office of the President, Office of Management and Budget), or in § 154-004 of this chapter shall be permitted as a matter of right in the Old Town (OT) District:

- (A) Local and suburban passenger transportation (SIC 411).
- (B) Taxicabs (SIC 412) and horse drawn carriages and other nonmotorized conveyances.
- (C) Intercity and rural bus transportation (SIC 413).
- (D) Bus charter service (SIC 414).
- (E) Terminal and service facilities for motor vehicle passenger transportation (SIC 417).
- (F) United States Postal Service (SIC 431).
- (G) Arrangement of passenger transportation (including travel agencies and tour operators) (SIC 472).
- (H) Water supply (SIC 494).
- (I) Paint, glass, and wallpaper stores (SIC 523).
- (J) General merchandise stores (SIC 53).
- (K) Food stores (SIC 54).
- (L) Apparel and accessory stores (SIC 56).
- (M) Home furniture, furnishings, and equipment stores (SIC 57).
- (N) Eating and drinking places (including outdoor dining) (SIC 58).
- (O) Miscellaneous retail (SIC 59, except fuel dealers - SIC 598 shall not be permitted).
- (P) Depository institutions (SIC 60).
- (Q) Nondepository credit institutions (SIC 61).
- (R) Security and commodity brokers, dealers, exchanges, and services (SIC 62).

- (S) Insurance carriers (SIC 63).
- (T) Insurance agents, brokers, and service (SIC 64).
- (U) Real estate (SIC 65).
- (V) Holding and other investment offices (SIC 67).
- (W) Hotels and motels (including bed and breakfast inns and conference facilities) (SIC 701).
- (X) Rooming and boarding houses (SIC 702).
- (Y) Membership based lodging (SIC 704).
- (Z) Laundry, cleaning, and garment services (SIC 721; excluding industrial launderers SIC 7218).
- (AA) Photographic studios, portrait (SIC 722).
- (BB) Beauty shops (SIC 723).
- (CC) Barber shops (SIC 724).
- (DD) Shoe repair shops and shoe shine parlors (SIC 725).
- (EE) Tax return preparation services (SIC 7291).
- (FF) Miscellaneous personal services (SIC 7299).
- (GG) Advertising agencies (SIC 7311).
- (HH) Consumer credit reporting agencies, mercantile reporting agencies, and adjustment and collection agencies (SIC 732).
- (II) Mailing, reproduction, commercial art and photography, and stenographic services (SIC 733).
- (JJ) Personnel supply services (SIC 736).
- (KK) Computer programming, data processing, and other computer related services (SIC 737).
- (LL) Passenger car rental (SIC 7514).
- (MM) Automobile parking (temporary) (SIC 7521).
- (NN) Motion picture theaters (except drive-in) (SIC 7832).
- (OO) Video tape rental (SIC 784).
- (PP) Amusement and recreation services (including auditoriums, performing arts centers, and physical fitness facilities) (SIC 79).
- (QQ) Medical and dental offices (SIC 801 - 804).
- (RR) Legal services (SIC 81).
- (SS) Individual and family social services (SIC 8322).
- (TT) Child day care services (SIC 835).
- (UU) Residential care (SIC 836).
- (VV) Social services (not elsewhere classified) (SIC 839).
- (WW) Museums, art galleries, and botanical and zoological gardens (SIC 84).

- (XX) Membership organizations (except religious organizations (SIC 86)).
- (YY) Engineering, accounting, research, management, and related services (including architects, designers, landscape architects, and urban planners) (SIC 87).
- (ZZ) Public administration (SIC 91 - 97).
- (AAA) Single-family dwellings.
- (BBB) Duplex dwellings.
- (CCC) Multiple-family dwellings.
- (DDD) Planned unit developments.
- (EEE) Artist's and crafters studios and lofts.
- (FFF) Itinerant uses.
- (GGG) Correction centers.
- (HHH) Visitor's centers.
- (III) Other uses as approved by the Zoning Administrator consistent with the purpose of the Old Town (OT) District.
- (JJJ) Wall-mounted (see § 154-441) and concealed/disguised (see § 154-442) personal wireless communication facilities are permitted as an accessory use for legally established **non-residential uses only**.
- (KKK) A roof-mounted (see § 154-440) personal wireless communication facility is permitted on a commercial building, or a mixed-use building which is primarily non-residential (75% of the use is non-residential).
- (LLL) The following permitted uses are allowed in combination with and may be contained in the same unit as a residential use as a live/work space:
 - (1) (V) Holding and other investment offices (SIC 67).
 - (2) (AA) Photographic studio, portrait (SIC 722).
 - (3) (EE) Tax return preparation services (SIC 7291).
 - (4) (II) Commercial art and photography, and stenographic services listed under SIC 733 (Mailing and reproduction services under this SIC are not included).
 - (5) (KK) Computer programming, data processing, and other computer related services (SIC 737).
 - (6) (RR) Legal services (SIC 81).
 - (7) (YY) Engineering, accounting, research, management, and related services (including architects, designers, landscape architects and urban planners) (SIC 87).
 - (8) (EEE) Artist's and crafter's studios and lofts.

All other principal permitted uses within the Old Town District not listed above may be contained within the same building as residential units (see live/work building) within the Old Town District but must have separate entrances and be independent from the residential use. Required parking spaces are determined by the gross square footage attributed to each use as further defined in this section and §§ 154-395 through 154-403.

(80 Code, App. A, § 95) (Ord. 583, passed 9-16-52; Ord. O95-073, passed 10-18-95; Ord. O2000-35, passed 6-21-00; Ord. O2002-09, passed 2-20-02; Ord. O2004-52, passed 8-4-04)

§ 154-188 Conditional Uses.

The following uses shall only be permitted upon the granting of a conditional use permit and compliance with all conditions as required therein:

- (A) Drive-through facilities.
- (B) Gasoline service stations (SIC 554).
- (C) Carwashes (SIC 7542).
- (D) Educational services (SIC 82).
- (E) Job training and vocational rehabilitation services (SIC 833).
- (F) Religious organizations (SIC 8661).
- (G) Outdoor sales (except outdoor eating and drinking places and itinerant uses which are principal permitted uses).
- (H) Utility installations.
- (I) Other uses as approved by the Zoning Administrator which further the purpose of the Old Town (OT) District.

('80 Code, App. A, § 95) (Ord. 583, passed 9-16-52; Ord. O95-073, passed 10-18-95)

§ 154-189 Prohibited Uses.

- (A) Any adult oriented business as defined by § 154-004 shall be prohibited in the Old Town (OT) District.
- (B) Wall strapping of a personal wireless communications facility is not permitted.
- (C) Personal wireless communication facilities are not permitted in conjunction with legal non-conforming uses.
- (D) The use of lattice tower structures for any personal wireless communication facility is not permitted.

('80 Code, App. A, § 95) (Ord. 583, passed 9-16-52; Ord. O95-073, passed 10-18-95; Ord. O2000-35, passed 6-21-00) Penalty, see § 154-999

§ 154-190 Development Standards.

In addition to the regulations and requirements contained in other sections of this chapter, the following minimum property development standards apply to all land and buildings in the Old Town (OT) District as may be designated on the official zoning map:

- (A) *Lot size.* The minimum lot size in the Old Town (OT) District shall be 1,500 square feet.
- (B) *Lot width.* The minimum lot width in the Old Town (OT) District shall be 15 feet.
- (C) *Lot coverage.* The maximum lot coverage in the Old Town (OT) District shall be 100%.
- (D) Projects with a residential component are required to provide a minimum of 2,000 square feet of lot area per residential unit for subdivisions or multi-family units on any project less than two acres in size and 1,000 square feet of lot area per residential unit for subdivisions or multi-family units on land equal to or greater than two acres.

§ 154-483 Revocation or Modification of Variances.

(A) *Revocation.* The Zoning Board of Adjustment, shall be authorized to hold a public hearing to consider the revocation, or modification, of a variance(s) previously granted in accordance with the provisions of the zoning code. A written notice of the date, time, place, and purpose of the hearing shall be served on the owner of the property for which the variance was granted by registered mail, return receipt requested, not less than seven days prior to the date of such hearing. Additional notice shall be provided as specified in § 154-477.

(B) *Findings.* A variance(s) may be revoked, or modified, if, from the facts presented at the public hearing, or by investigation, the Zoning Board of Adjustment makes an affirmative determination on any one or more of the following findings:

(1) That the variance(s) approval was obtained by fraud;

(2) That the variance(s) granted is being exercised contrary to the conditions of approval of such variance(s), or in violation of any applicable law, license, ordinance, permit or regulation;

(3) That the use for which the variance(s) approval was granted is being, or has been, exercised as to be detrimental to the public health, or safety, or so as to constitute a nuisance.

(C) *Appeal of revocation.* Each decision by the Zoning Board of Adjustment to revoke variance(s) shall be by a majority of the membership of the Board present and voting. Any person may appeal the revocation in writing to the Planning and Neighborhood Services Division, including any required appeal fee, within 30 days of the decision of the Board of Zoning Adjustment. The appeal shall be forwarded to the City Council. The City Council may, after a public hearing, affirm, reverse, or modify the decision of the Zoning Board of Adjustment.

(80 Code, App. A, § 211) (Ord. 583, passed 9-16-52; Ord. 095-090, passed 12-20-95)

Conditional Use Permits**§ 154-495 Purpose.**

The purpose for the conditional use permit procedure is to allow approval of uses which are deemed to possess location, use, building, or traffic characteristics of such unique, and special, form as to make impractical, or undesirable, their automatic inclusion as permitted uses in certain districts. The Planning and Zoning Commission shall have the authority to grant approval for conditional uses, under the procedures herein stated. In granting a conditional use permit; certain safeguards may be required, and certain conditions established to accomplish to following:

(A) To protect the public health, safety, convenience, and general welfare; and

(B) To assure that the purposes of the zoning code shall be maintained with respect to the particular conditional use on the particular requested site; and

(C) To consider the location, use, building, traffic characteristics, and environmental impact(s) of the proposed use; and

(D) To consider existing and potential uses with the general area in which the requested conditional use is proposed.

(80 Code, App. A, § 215) (Ord. 583, passed 9-16-52; Ord. 095-090, passed 12-20-95)

§ 154-496 Conditions of Approval.

The conditions of approval required by the Planning and Zoning Commission in granting a conditional use permit may include, but are not limited to, provisions concerning access, aesthetics, appearance, area, driveways, environmental attenuation, general character, height, hours of operation, lighting, loading,

neighborhood compatibility; noise attenuation, on- and off-site improvements, open spaces, operating hours, parking, prevention of vandalism or graffiti, revocation dates, security of persons and property, setbacks, signs, site plan, size, street right-of-way dedication, time limits for commencing construction or use authorization, use, walls, yards, and any other conditions the Planning and Zoning Commission may deem appropriate and necessary to carry out the purpose(s) of the zoning code.

('80 Code, App. A, § 215) (Ord. 583, passed 9-16-52; Ord. O95-090, passed 12-20-95)

§ 154-497 Exceptions; Approval or Denial.

In granting a conditional use permit, the Planning and Zoning Commission shall be authorized to hear and decide applications for an exception(s) as follows:

- (A) When filed concurrently with a conditional use permit application; and
- (B) As authorized by § 154-475(A) as a variance to the zoning code; and
- (C) Provided the Planning and Zoning Commission shall make the four findings of fact required by § 154-475(D) of the zoning code.

('80 Code, App. A, § 215) (Ord. 583, passed 9-16-52; Ord. O95-090, passed 12-20-95)

§ 154-498 Types of Conditional Uses.

The Planning and Zoning Commission may grant a conditional use permit in accordance with the procedures stated in the zoning code for any of the following uses:

- (A) Any use listed as a conditional use in any district.
- (B) A temporary and revocable use of property on an undeveloped parcel(s) for a maximum period of 12 months; provided, such use be of a true temporary nature, does not require the erection of substantial buildings or improvements, and shall be subject to the applicant furnishing satisfactory assurance of complete removal of such buildings or improvements at the expiration of the permit approval.
- (C) Any hazardous material environmental remediation program, project, or facility proposed to exceed a ten-day period for property in any district.

('80 Code, App. A, § 215) (Ord. 583, passed 9-16-52; Ord. O95-090, passed 12-20-95)

§ 154-499 Application.

A written application shall be submitted to the Planning and Neighborhood Services Division as follows:

- (A) On the form provided by the Zoning Administrator and signed by the property owner; and
- (B) Shall specify the conditional use requested; and
- (C) Shall be accompanied by a nonrefundable filing fee in accordance with the fee schedule adopted by City of Yuma Ordinance No. 1943, and successors; and
- (D) Shall include reasons for granting the application; and
- (E) Shall include plans and other pertinent information.

('80 Code, App. A, § 215) (Ord. 583, passed 9-16-52; Ord. O95-090, passed 12-20-95)

§ 154-500 Public Hearing.

- (A) A public hearing shall be held by the commission. Notice of the time and place of the hearing shall be given as follows:

- (1) In at least one publication in a newspaper of general circulation in the city, at least 15 days before the hearing; and
- (2) By posting of notice in conspicuous places on, or close to, the property; and
- (3) By mail or hand delivery at least 28 days before the hearing to all owners of property within 300 feet of the exterior boundaries of the subject property of the request, using the name and address shown on the county assessment roll.

(B) Failure of any property owner to receive said notice shall not invalidate the proceedings.

('80 Code, App. A, § 215) (Ord. 583, passed 9-16-52; Ord. Q95-090, passed 12-20-95; Ord. Q2003-66, passed 12-3-03)

§ 154-501 Planning and Zoning Commission Action.

(A) The Planning and Zoning Commission shall have the authority to hear and decide applications for conditional use permits. However, when specified by the zoning code that the City Council shall have the final authority to decide applications for conditional use permits, the decision of the Planning and Zoning Commission shall be advisory to the City Council.

(B) In order to approve an application for a conditional use permit, the Planning and Zoning Commission shall make a finding that each of the following questions can be answered affirmatively:

- (1) Is the Planning and Zoning Commission, or the City Council, authorized under the zoning code to grant the conditional use permit described in the application?
- (2) Will the establishment, maintenance, and/or operation of the requested conditional use, under the circumstances of the particular case, not be detrimental to the health, safety, peace, morals, comfort, or general welfare of persons residing, or working, in the vicinity or such proposed use, or be detrimental, or injurious, to the value of property in the vicinity, or to the general welfare of the city?
- (3) Are the provisions for ingress, egress, and traffic circulation, and adjacent public streets adequate to meet the needs of the requested conditional use?
- (4) Are the provisions for building(s) and parking facility setbacks adequate to provide a transition from, and protection to, existing and contemplated residential development?
- (5) Are the height and bulk of the proposed buildings, and structures, compatible with the general character of development in the vicinity of the requested conditional use?
- (6) Have provisions been made to attenuate noise levels and provide for adequate site, and security lighting?
- (7) Has the site plan for the proposed conditional use, including, but not limited to landscaping, fencing, and screen walls and/or planting, CPTED strategies (Crime Prevention Through Environmental Design), and anti-graffiti strategies been adequately provided to achieve compatibility with adjoining areas?

('80 Code, App. A, § 215) (Ord. 583, passed 9-16-52; Ord. O95-090, passed 12-20-95)

§ 154-502 Expiration and Time Extensions.

(A) *Expiration.* In any case where a conditional use permit has not been used within one year after the granting thereof, it shall be null and void.

(B) *Time extensions.* The Commission, or in the case of City Council approval, the Council, shall hold a public hearing to consider the granting of a time extension of no more than one additional year as follows:

- (1) Upon request by the applicant; and
- (2) When the request is filed in writing with the Planning and Neighborhood Services Division prior to the expiration date of the original conditional use permit approval; and

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2009, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT AND URGING REVERSAL with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On August 7, 2009, I served two copies of the brief by FedEx overnight delivery to each of the following non-CM/ECF participants:

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