

Commentary

Editor's Note: *The Religious Land Use and Institutionalized Persons Act (RLUIPA) is in the news and in the courts. On January 15, the headline read "Mamaroneck village to pay \$4.75M to yeshiva." The settlement agreement brings to an end a five-year dispute between the Westchester Day School and the village. The village spent more than \$900,000 in legal fees fighting the Orthodox Jewish school's expansion project. How might this RLUIPA battle have been avoided? This month's commentary addresses that question—not specifically the Mamaroneck battle but in general: What should a local government attorney know about RLUIPA to (hopefully) avoid a RLUIPA claim? This commentary will be part of a new book about RLUIPA to be published later this year by the American Bar Association, with cosponsorship by the American Planning Association.*

How to Avoid a "Holy War" — Dealing With Potential RLUIPA Claims

Alan C. Weinstein

INTRODUCTION

RLUIPA¹ was signed into law by President Clinton on September 22, 2000. Almost immediately, churches² in every section of the country began to use the statute to challenge local government decisions they viewed as obstacles to how they could develop or use their properties.³ In the succeeding years, hardly a week has gone by without at least one news story announcing that a church, synagogue, temple, mosque, or religious school is claiming that its right to religious freedom is being infringed upon by local government land use regulations that violate the statute.

While some RLUIPA claims have verged on the frivolous,⁴ many disputes pose serious questions about how local governments should balance the goals of land use regulations and the religious mission of churches in the context of a society experiencing rapid cultural and demographic change.

UNDERSTANDING RLUIPA CLAIMS: THE LEGAL, POLITICAL, AND SOCIAL LANDSCAPE

Local government officials need to understand that the "landscape" they will have to navigate when seeking to avoid a RLUIPA claim has legal, political, and social dimensions. Legally, RLUIPA claims occupy a middle ground between challenges to land use regulations in which government is presumed to have acted lawfully and challenges in which government does not have the benefit of that presumption.

Most land use regulation disputes involve either: (a) plans by a property owner or developer to intensify the use of a given property which the city and/or neighbors oppose, or (b) efforts by the city or neighbors to impose additional restrictions on the use of a given property, which the owner or developer opposes. Because such disputes normally involve "economic

rights," local government regulatory actions are presumed to be constitutional and parties challenging the government action, typically under the taking, due process, or equal protection clauses of the state or federal constitution, must overcome that presumption.

A less common type of dispute involves challenges to land use regulations based on a claim that they intrude impermissibly on rights guaranteed under the First and 14th amendments of the Constitution, such as freedom of speech or religion. Typically, these disputes arise when the government seeks to regulate signs and billboards, adult entertainment businesses, or religious institutions. In these cases, government does not receive the benefit of a presumption that its regulations are constitutional.

RLUIPA claims occupy a legal position in between these two types of disputes. With one significant exception, once a plaintiff produces prima facie

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1. Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, codified at 42 U.S.C. § 2000cc (2000).

2. I will use the term "church" as shorthand for all houses of worship or other religious institutions when speaking about such uses generally.

3. A mere four days after the bill was signed by President Clinton,

The Becket Fund for Religious Liberty filed a lawsuit under RLUIPA in Haven Shores Cmty. Church v. City of Grand Haven, Mich., No. 1:00-CV-175 (W.D. Mich. S.D. 2000). See "Becket Fund files action under new federal law," at <http://www.becketfund.org/index.php/article/186.html>. The first RLUIPA decision on Westlaw was dated March 13, 2001, less than six months after

the law was enacted; see *Shepherd Montessori Center Milan v. Ann Arbor Charter Twp.*, 2001 WL 34137899 (Mich. Cir. Ct.). The first reported decision appeared later that same month; see *Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago*, 157 F.Supp.2d 903 (N.D.Ill. 2001).

4. See, e.g., *Omnipoint Commc'ns, Inc. v. City of White*

Plains, 202 F.R.D. 402 (S.D.N.Y. 2001) (ruling that city's denial of a permit to construct a transmission tower on a golf course did not invoke RLUIPA jurisdiction for a neighboring synagogue seeking to intervene in a plaintiff telephone company's challenge to the denial).

Where previous generations attended houses of worship in their own neighborhood, commentators have noted that today, “religious institutions serve populations that are less and less centered in the geographic communities in which they are located.”

evidence to support an alleged RLUIPA violation, local government cannot claim a presumption that its regulation is lawful, but rather bears the burden of persuading the court that the challenged regulation should be upheld.⁵ The one significant exception involves a claim that a land use regulation imposes a “substantial burden” on the plaintiff’s exercise of religion. In that case, the plaintiff bears the burden of persuading the court that the regulation in fact has that effect. Meeting that burden of persuasion has proved difficult.

A second aspect of RLUIPA’s “legal landscape”—the availability of expert legal assistance for RLUIPA plaintiffs from “public interest law firms”—is related to the political and social landscape. In recent decades, social and political debate over the proper relationship between religion and government in American society has played out in our media, at the ballot box, and in our legislatures and courtrooms. In all of these forums, advocates for the strict separation of church and state argue that religion deserves no “special treatment” from government, while proponents of a larger role for religion in society contend that government should, at a bare minimum, accommodate the needs of religious institutions and practitioners. At the local level, these differing perspectives have often led to disputes about the application of local zoning and historic preservation ordinances to houses of worship and other religious uses of property.

This debate, like many others in our society, is carried on to a significant degree by “interest groups” on both sides of the issue.⁶ One of these groups, The Becket Fund, which strongly favors the accommodation position, has effectively established a “public interest law firm” to provide litigation support for churches

that are considering a RLUIPA claim.⁷ The Fund’s attorneys have assisted local counsel or participated directly in scores of RLUIPA cases. As a result, local governments should anticipate that any potential RLUIPA plaintiff will be represented, normally pro bono, by prominent local counsel with expert assistance from The Becket Fund or other public interest attorneys. In addition, the fact that RLUIPA provides for an award of attorneys fees to a winning church—even when the church’s attorneys agreed to handle the matter pro bono—only adds to a city’s concern that it may not only lose a RLUIPA challenge but be assessed significant attorneys fees to boot.

Although it is certainly not a “public interest” law firm, the U.S. Department of Justice has also come to play a prominent role in RLUIPA litigation. The Bush administration has placed RLUIPA enforcement high on the agenda of the Justice Department and, through 2006, lawyers in its Housing and Civil Rights Division had inquired into approximately 80 RLUIPA matters, opened more than 25 formal investigations (a significant number of which resulted in a favorable outcome for the complainant) and filed three cases in federal court against local governments.⁸

Another aspect of the political and social landscape for RLUIPA claims is that disputes over the application of local zoning and historic preservation ordinances to houses of worship and other “religious” uses of property have been escalating. Obviously, the enactment of RLUIPA itself has played a major role in that escalation, but there are larger factors at work that predate RLUIPA.

First, houses of worship today are more likely to be perceived as inflicting negative effects on neighboring properties. New churches, and older

ones seeking to expand an existing use, often are significantly larger than the churches of earlier eras and use their facilities more intensively. In addition to religious services, many churches sponsor a school, day care center, adult education classes, a variety of programming serving different age groups, and various faith-based “support” groups. Some churches also provide shelter for the homeless and meals for the indigent. Many houses of worship also have venues where wedding receptions or bar/bat mitzvah celebrations are held late into the night on weekends. As church activities expand to 12 or more hours per day seven days a week, neighbors become increasingly concerned about the negative effects of the increased traffic, parking, noise, and late-night activity on property values.

Of course, any new or expanded “non-residential” development proposed for a residential neighborhood—the traditional locale for houses of worship—is likely to be opposed by neighbors. But the classic “NIMBY” phenomenon poses additional difficulties with respect to houses of worship because of recent changes in the manner in which Americans worship. Where previous generations attended houses of worship in their own neighborhood, commentators have noted that today, “religious institutions serve populations that are less and less centered in the geographic communities in which they are located.”⁹ Thus, the proposed house of worship is likely to be seen by its neighbors as providing few benefits—since most of them will not be members—while imposing on them the burdens associated with any more intense land use, such as increased traffic, parking difficulties, noise, and the possibility of negative effects on property values.

5. RLUIPA, 42 U.S.C. § 2000cc-2(b)

6. For example, Americans United for the Separation of Church and State, <http://www.au.org>, on the strict separation side, and The Becket Fund, <http://www.becketfund.org>, on the accommodation side.

7. The introductory materials in the “Litigation” section of the Fund’s

website state: “The Becket Fund litigates to protect the free expression of all religious traditions, both in the United States and abroad. In our first ten years, we have represented people of faith literally from A to Z—Anglicans, Zoroastrians, and virtually everyone in between—as both primary counsel and amicus curiae, in federal and state trial and appellate courts, throughout the United States.

We have developed expertise in all areas of religious freedom law, but especially under the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the U.S. Constitution.” <http://www.becketfund.org/index.php/case/>

8. Report of the U.S. Dept. of Justice Housing and Civil Rights Division at <http://www.usdoj.gov/crt/activity.html>.

9. Marc D. Stern, *Zoning for Churches: Guidelines, But No Magic Formula*, 7 RESPONSIVE COMMUNITY No. 3 at 69, 70 (1997).

Local officials may also be concerned about erosion of the city's tax base if too much property is acquired by tax-exempt religious institutions.

The rapidly increasing scope of our religious diversity may also be a factor in some land use disputes involving religious institutions. Traditionally the major religious institutions in most American communities were those affiliated with the Catholic Church or "mainstream" Protestant denominations such as Lutheran, Baptist, Methodist, and Presbyterian, with larger cities also home to a variety of Jewish, Eastern Orthodox, and smaller Christian denominations. In contrast, today's fastest-growing religious groups—Mormon, Evangelical Christian, Orthodox Muslim, Hindu, Sikh, Buddhist, and ultra-Orthodox Judaism—which previously were either geographically isolated (e.g., the Mormons in Utah and ultra-Orthodox Jews in New York City) or a minor presence until their numbers were swelled by recent immigrants (Hindus, Buddhists, Sikhs, and Muslims)¹⁰—now may be found in almost any American community.

At times, the entry of such "non-mainstream" groups into a community—or the local community's reaction to it—can lead to land use conflicts. A study of all reported cases in the zoning and land use context claims that its findings "strongly suggest that a high percentage of cases are being contested by religious groups comprising a very small percentage of the total population."¹¹ Why is this so? On the one hand, the arrival of a new religious denomination—if it is small and impecunious—can lead to conflict if the members of the fledgling congregation seek to worship and study regularly in a private home or a rented storefront and the neighbors or local officials claim the property is not zoned for use as a house of worship.

On the other hand, when a well-funded religious denomination arrives and seeks approval for a new, large house of worship—a Mormon temple¹² or a "big box church"¹³ being paradigmatic cases—neighbors or local officials may again object, citing such traditional zoning concerns as effect on property values, traffic, parking, landscaping, etc. as the basis for their opposition. Local officials may also be concerned about erosion of the city's tax base if too much property is acquired by tax-exempt religious institutions. Regrettably, conflict may sometimes arise as a result of citizens' and local officials' antipathy for, and resulting discriminatory actions toward, the newly arrived, or rapidly expanding, denomination.¹⁴

HOW DOES RLUIPA AFFECT LAND USE REGULATION?

RLUIPA can be implicated in several ways when a local land use regulation is applied to a church. First, RLUIPA has a "general rule" calling for strict judicial scrutiny of land use regulations that impose a "substantial burden" on religious exercise. RLUIPA also provides that local land use regulations must: grant "equal treatment" to a religious assembly or institution; not discriminate against any assembly or institution on the basis of religion or religious denomination; and not impose or implement a land use regulation that totally excludes religious assemblies from a jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

RLUIPA's general rule prohibits a local government from imposing or implementing 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 can demonstrate that imposition of the burden is in furtherance of a "compelling governmental interest" and is the "least restrictive means of furthering" that interest.¹⁵ RLUIPA defines "land use regulation" as a "zoning or land-marking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest."¹⁶ RLUIPA defines "religious exercise" both in general terms—"any exercise of religion, whether or not compelled by, or central to, a system of religious belief"¹⁷—and by means of a rule: "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."¹⁸

RLUIPA's general rule does not, however, define "substantial burden." RLUIPA's congressional sponsors made it clear that this omission was intentional: "The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of substantial burden on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence."¹⁹ In short, the general rule mandates that once a RLUIPA plaintiff demonstrates that a land use regulation imposes a substantial burden on the exercise of religion, the court must apply strict scrutiny in judging the validity of the challenged land use regulation.

10. For example, in 1990, the National Survey of Religious Identification (NSRI), conducted by the Graduate School of the City University of New York, estimated the number of Muslims in the United States at 527,000. A decade later, the 2000 edition of the *Yearbook of American and Canadian Churches* estimated there were 3.95 million Muslims in America.

11. "Appendix A, Discrimination Against Minority Churches in Zoning Cases," in Von G. Keetch

and Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725, 736 (1999). *Id.* at 740.

12. See, e.g., Martin v. The Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141 (2001) (rejecting neighbor's challenge to city's exempting proposed 83 foot high spire atop a temple from normal height restrictions).

13. See, e.g., Jim Schwab, "Zoning and Big Box Religion," ZONING NEWS

(November 1996) (discussing the emergence of "megachurches" that can have substantial impacts on surrounding land uses).

14. Professor Douglas Laycock notes that there is suspicion of, or hostility to, religious intensity. "People who are religious themselves are often hostile to unfamiliar faiths, to high intensity faiths, and to the conservative and evangelical churches associated with the 'Religious Right.'" Thus in 1993, 45 percent of Americans admitted to

'mostly unfavorable' or 'very unfavorable' opinions of 'religious fundamentalists,' and 86 percent admitted to mostly or very unfavorable opinions of 'members of religious cults or sects.' In 1989, 30 percent of Americans said they would not like to have 'religious fundamentalists' as neighbors, and 62 percent said they would not like to have 'members of minority religious sects or cults' as neighbors. A desire not to have members of a minority sect as neighbors is closely related to a de-

sire not to have the minority sect's church as a neighbor." Douglas Laycock, *State RFRAs and Land Use Litigation*, 32 U.C. DAVIS L. REV. 755, 760 (1999) (footnotes omitted).

15. 42 U.S.C.A. § 2000cc-(a).

16. 42 U.S.C.A. § 2000cc-5(5).

17. 42 U.S.C.A. § 2000cc-5(7)(A).

18. 42 U.S.C.A. § 2000cc-5(7)(B).

19. Joint Statement of Senators Kennedy and Hatch, 146 Cong. Rec. 7776-01. (Hereafter "Joint Statement").

Local government reactions to potential RLUIPA claims have run the gamut from immediate unconditional surrender at a church's mere mention of RLUIPA, to good-faith efforts at compromise . . . to willingness to litigate the case all the way to the U.S. Supreme Court.

RLUIPA's "equal treatment" section provides that no local 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."²⁰ The Act's "non-discrimination" section prohibits land use regulations "that discriminate against any assembly or institution on the basis of religion or religious denomination."²¹ Finally, the Act's "exclusions and limits" section provides that "No government shall impose or implement a land use regulation that: A) totally excludes religious assemblies from a jurisdiction; or B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."²² Although all of these provisions refer to "a religious assembly or institution," the Act does not define either term; however, their differing treatment in the "exclusions and limits" section—the ban on total exclusion applies only to "religious assemblies"—strongly suggests that "religious assembly" is a broader term than "religious institution" and would include, for example, informal religious groups that worship or study in private homes.

RLUIPA also contains a "jurisdictional element" that has been an issue in some RLUIPA litigation. Local officials need only understand that while the Act by its terms applies only to those land use regulations that permit the government to make "individualized assessments" regarding the use of the affected property,²³ courts have normally found that almost any required zoning approval qualifies as an "individualized assessment."²⁴

HOW TO AVOID A RLUIPA CLAIM

Advising local officials on how to avoid a RLUIPA claim is no easy task. Once we are beyond obvious "no-nos"—

things like "don't totally exclude churches" or "don't regulate churches in a discriminatory manner" (e.g., require them to obtain a conditional use approval while similar secular uses are allowed "as of right")—it is difficult to prescribe a list of specific dos and don'ts. Each potential RLUIPA claim arises within the context of a particular site and the implementation of a specific land use code. Thus, when it comes to RLUIPA, the adage that "the devil is in the details" is particularly apt: It is difficult to provide specific guidance absent knowledge of those details. Further, similar "RLUIPA facts" can yield very different outcomes depending on the attitudes and knowledge of the parties involved.

Local government reactions to potential RLUIPA claims have run the gamut from immediate unconditional surrender at a church's mere mention of RLUIPA, to good-faith efforts at compromise, to willingness, perhaps even eagerness, to litigate the case all the way to the U.S. Supreme Court. These differing reactions are partly explained by the facts of particular RLUIPA disputes, but another critical factor is the attitude of the parties. If either or both of the parties is unwilling to acknowledge the legitimacy of, or minimize, the other's concerns, conflict rather than compromise is the more likely outcome. Thus, for example, some religious leaders may believe that RLUIPA affords them almost *carte blanche* when it comes to complying with land use regulations. Similarly, some local officials may lack sensitivity to the legitimate needs of a particular religious group or, on rare occasion, actually view a particular religion or sect in a negative light.

A final factor making specific advice difficult is that the courts have not provided clear-cut guidance in the

RLUIPA decisions issued to date. This may be due, in part, to the unique circumstances of each case, and also due to the fact that courts have differed in interpreting RLUIPA's provisions.

Proactive Steps Local Governments Might Take to Avoid a RLUIPA Claim

When it comes to facing an actual RLUIPA claim, local government officials need to understand that some claims should not be avoided. RLUIPA was enacted to address congressional concerns about unfair treatment of religious land uses, not to provide religious land uses with immunity from land use regulation.²⁵ Local officials need to give serious consideration to any claim that a land use regulation violates RLUIPA, but if after such consideration they decide that the claim lacks merit, they should not accede to a violation of a legitimate land use regulation merely to avoid possible litigation.²⁶

Local officials can seek to avoid a potential RLUIPA claim both proactively and reactively. Proactively, local governments should examine their land use regulations affecting religious uses and how those regulations have been applied. At a minimum, zoning ordinances should provide reasonable options for locating new, or expanding, houses of worship and such accessory religious uses as schools. While providing such options may not be particularly difficult in newer, less-developed communities, it can be a problem in older communities that are almost fully developed. Such communities may find that their current zoning effectively precludes houses of worship from residential areas because no sites are available, and also severely restricts their location in business and industrial areas, either because religious uses are seen as incompatible in such zones or out of a concern for maintaining the city's tax

20. 42 U.S.C.A. § 2000cc-2(b)(1).

21. 42 U.S.C.A. § 2000cc-2(b)(2).

22. 42 U.S.C.A. § 2000cc-2(b)(3).

23. 42 U.S.C.A. § 2000cc-(a)(2).

24. See, e.g., *Living Water Church of God v. Charter Twp. of Meridian*, 384 F.Supp.2d 1123, 1130 (W.D.Mich. 2005), where the court stated: ". . . even assuming that a governmental entity's enactments

are neutral laws of general applicability, their application to particular facts nevertheless can constitute an individualized assessment—particularly where, as here, the application does not involve a mere numerical or mechanistic assessment, but one involving criteria that are at least partially subjective in nature." But see *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643

(10th Cir. 2006) (finding that denial of variance was not a subjective individualized assessment). In addition to invoking RLUIPA jurisdiction via an "individualized assessment," RLUIPA plaintiffs claiming that a land use regulation has imposed a substantial burden on religious exercise can also seek to invoke jurisdiction if the substantial burden is imposed in connection with a federally funded activity or

where the burden affects interstate commerce. See 42 U.S.C.A. §§ 2000cc-(a)(2)(A) & (B).

25. Joint Statement, 146 Cong. Rec. 7776-01.

26. While RLUIPA claims have fared somewhat better than religious use claims prior to RLUIPA, see, e.g., Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120

HARV. L. REV. 2178 (2007), local governments have prevailed in a substantial proportion of all RLUIPA litigation.

Local governments should also review the procedural requirements of their land use regulations to ensure that they are administered fairly and in a nondiscriminatory manner as applied to religious institutions.

base. Where options are effectively nonexistent or extremely limited, a local government should undertake a planning study that seeks to determine how it might accommodate the needs of religious uses without unduly harming surrounding property owners.

Local governments should also examine whether they have adequate locational options for “social service” uses such as shelters for the homeless or victims of domestic abuse and facilities to feed the homeless and indigent. The claims of religious institutions that a local government must allow them to “minister to the poor” at a location of their choosing is blunted when a zoning code designates reasonable options for both secular and religious groups to provide such services.

Historic preservation ordinances should also be reviewed. As a rule, such ordinances should not allow landmark designation of the interior of a sanctuary without consent of the religious institution²⁷ and should also contain a “hardship” exemption that could be applied to a designated structure if the church meets appropriate criteria.²⁸

Local governments should also review the procedural requirements of their land use regulations to ensure that they are administered fairly and in a nondiscriminatory manner as applied to religious institutions. Officials need to make sure that land use procedures do not overtly or inadvertently grant religious uses favorable or unfavorable treatment in the land use regulatory process and applications from religious uses are treated no differently than similar applications from secular uses.

Finally, local elected officials should also consider arranging for “sensitivity training” for themselves and other appropriate public employees to enhance their awareness of religious differences and the need to provide equal treat-

ment to all religious adherents and institutions. It is far less costly to conduct such training before a lack of “sensitivity” to religious differences results in a RLUIPA violation.²⁹

Reactive Steps Local Governments Should Take to Avoid a RLUIPA Claim

While providing specific substantive guidance on avoiding a potential claim is difficult, guidance on procedural matters is more straightforward. Local government officials and staff need to be aware that when dealing with either an enforcement action or an application for a land use approval by a church, extra care is advisable, just as it is with other land uses—such as adult entertainment businesses or signs and billboards—that have legal protection beyond the norm. For example, when government employees and officials meet with principals or representatives of a church to discuss a land use application, they would be well advised to conclude the meeting by confirming with church officials, in writing, the precise points of agreement or disagreement in that discussion and then follow up with a letter or e-mail reiterating that understanding and requesting notification if there is any disagreement. This practice can help to avoid “we said/they said” disputes that could lead to litigation.³⁰

Another way of taking extra care is to establish some type of internal review process when enforcement actions target religious uses. The goal here is not to exempt churches from enforcement of land use regulations, but rather to ensure that churches or, more likely a particular church, is not being singled out for more frequent or severe enforcement that could form the basis for a discriminatory treatment claim under RLUIPA.

Cities should also be extremely cautious about departing from well-estab-

lished precedents when handling a church’s land use application. Such a departure can easily lead to a potential RLUIPA claim. For example, in *Hollywood Community Synagogue, Inc. v. City of Hollywood, Fla.*,³¹ the plaintiff synagogue applied for a conditional use permit that would allow it to use two houses on the edge of a residential district for religious worship and study. The city granted the permit, but for a term of only one year, after which the application would have to be reconsidered. The city had considered many such applications in the past from both churches and secular uses and had never previously granted only a “temporary” permit. This different treatment of the plaintiff’s application ultimately formed one aspect of a successful RLUIPA claim that led to a settlement in which the city paid the plaintiff \$2 million in damages.³² In another case, the district court ruled that the city’s refusal even to accept a church’s zoning permit application—surely a departure from normal procedures—constituted a substantial burden on religion.³³

The big question for local governments, of course, is how they should respond substantively when a church makes a land use application or challenges an enforcement action. The starting point for evaluating whether a potential RLUIPA claim can (or should) be avoided is to determine whether you need to be concerned about RLUIPA in the first place: Does the potential claim even fall within the protection of the statute? Remember that RLUIPA applies only to “land use regulations;” i.e., zoning and historic preservation. Thus, while some churches have brought a RLUIPA challenge to an exercise of eminent domain, except for dicta in a footnote in one case, every court that has considered the issue has ruled that

27. Interior designation, because it “freezes” the interior at a point in time and thus would disallow changes to reflect subsequent doctrinal developments, may readily be seen either as imposing a substantial burden on religious exercise or violating the establishment clause; see, e.g., *Soc’y of Jesus v. Boston Landmarks Comm’n*, 409 Mass. 38, 564 N.E.2d 571 (1990).

28. See, generally, Alan C. Weinstein, *The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 TEMP. L. REV. 91 (1992).

29. See, e.g., *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, Fla.*, 436 F.Supp.2d 1325 (S.D. Fla. 2006) (granting exceptions to day care and educa-

tion centers, but denying exception to house of worship, violated RLUIPA), where after losing a RLUIPA challenge, city officials agreed to a settlement that included paying \$2 million to the RLUIPA plaintiff and agreeing that city employees, including elected officials, would attend mandatory religious sensitivity training. See *Hollywood to pay \$2 million to*

synagogue, MIAMI HERALD ONLINE, 6/26/06, 2006 WLNR 11054024.

30. See, e.g., *Lighthouse Cmty. Church of God v. City of Southfield et al.*, 2007 WL 30280 (E.D. Mich.) (disputing views of whether city officials ever represented to church that a property could be used for religious purposes).

31. 436 F.Supp.2d 1325 (S.D. Fla. 2006).

32. See *Hollywood to pay \$2 million to synagogue*, MIAMI HERALD ONLINE, 6/26/06, 2006 WLNR 11054024.

33. See *Castle Hills First Baptist Church of God v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. 2004).

Most “substantial burden” claims under RLUIPA have relied on the “individualized assessments” element, which can easily be met when the church is applying for a zoning permit . . . or some other permit where there is opportunity for the exercise of discretion.

an exercise of eminent domain is not a land use regulation and thus not governed by RLUIPA.³⁴

Other cases have found no jurisdictional basis for a claimed RLUIPA violation where a city had annexed land owned by a church;³⁵ a city decided to develop a previously dedicated roadway located between two church-owned lots;³⁶ a city decided to demolish an old church rather than transfer it to a clergyman;³⁷ and where a city had denied a telecommunications company a permit to construct a transmission tower on a golf course. The court ruled that action did not invoke RLUIPA jurisdiction for a neighboring synagogue seeking to intervene in a plaintiff telephone company’s challenge to the denial.³⁸ Other types of regulatory actions that are clearly outside RLUIPA’s jurisdiction include: building or fire safety permits, permits for utility connections, and other types of “public health, safety, and welfare” permits that are outside of either zoning or historical preservation codes.

If a permit application or enforcement action is within the subject matter jurisdiction of RLUIPA, the next step in determining whether there could be a potential RLUIPA claim is to see whether it falls within one of the Act’s three jurisdictional elements: individualized assessments, affecting interstate commerce, or involving federal funding. These jurisdictional elements are only found, however, in the “substantial burden” section of RLUIPA, and thus would not have to be satisfied if an enforcement action or denial of a

permit application could be challenged as violating the “equal terms,” “nondiscrimination,” or “exclusions and limits” sections of RLUIPA.³⁹ Where a potential claimant could assert that the regulation or its implementation places a “substantial burden” on religious exercise, however, the claimant must show that one of these jurisdictional elements has been met.

Most “substantial burden” claims under RLUIPA have relied on the “individualized assessments” element, which can easily be met when the church is applying for a zoning permit, conditional use permit, variance, or some other permit where there is opportunity for the exercise of discretion.⁴⁰ In contrast, although granting or denying a zoning change is clearly discretionary and thus would seem to be an “individualized assessment,”⁴¹ one court has ruled that it is not an “individualized assessment,” presumably because it viewed the rezoning as a legislative act involving broad policy and political judgments.⁴² Courts have also proven to be relatively sympathetic to the claim that a substantial burden on religious exercise successfully invokes the “affects interstate commerce” jurisdictional element.⁴³ In short, meeting the jurisdictional element should not pose a significant problem for a church as it considers a potential substantial burden RLUIPA claim.

We now come to the crux of the matter: What should local governments do—or refrain from doing—to avoid a potential RLUIPA claim when considering a permit application or an enforcement action?

In very general terms, local governments have tended to prevail against RLUIPA challenges when they could demonstrate that the restrictions placed on a church do not target religious uses for discriminatory treatment, are necessary to achieve valid land use regulatory goals, and do not force the church to cease religious worship. Conversely, churches have tended to prevail when local government was unable to meet these same criteria.

Guidance becomes more difficult when we move away from those kinds of generalities. “Substantial burden” claims are particularly difficult in this regard. Recall that RLUIPA does not define “substantial burden”; the drafters’ intent was that courts define the term in line with prior precedent. That strongly suggested that courts would be extremely unlikely to find that a land use regulation had imposed a substantial burden on a church, but that has not been so. While the majority of substantial burden claims have failed outside the context of unemployment compensation claims, courts have found in a number of cases that land use regulations indeed imposed a substantial burden on the exercise of religion.⁴⁴ These differing outcomes can be explained in part by the different ways that courts have articulated what constitutes a “substantial burden.” For example, the Seventh Circuit has interpreted “substantial burden” both quite narrowly—a substantial burden is imposed only when regulations make religious exercise “impracticable” within the jurisdiction

34. See *St. John’s United Church of Christ v. City of Chicago*, — F.3d —, 2007 WL 2669403 (7th Cir.), *aff’d*, 401 F.Supp.2d 887 (N.D.Ill. 2005). Here, the Seventh Circuit held that eminent domain was not a land use regulation, listed other cases in accord, and noted that the only exception was dicta in an early RLUIPA case, *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1222 n. 9 (C.D. Cal. 2002).

35. *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2006).

36. *Prater v. City of Burnside, Ky.*, 289 F.3d 417 (6th Cir. 2002).

37. *Taylor v. City of Gary, Ind.*, 2007 WL 1317130 (7th Cir.) (unreported).

38. *Omnipoint Commc’ns, Inc. v. City of White Plains*, 202 F.R.D. 402 (S.D.N.Y. 2001).

39. See, e.g., *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.2d 1214, 1229 (11th Cir. 2004).

40. See, e.g., *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 986 (9th Cir. 2006) “stating ‘RLUIPA applies when the government may take into account the particular details of an applicant’s proposed use of land when deciding to permit or deny that use.’” One recent case argues that enforcement actions triggered by citizen complaints can also constitute an “individualized assessment.” In that case, the city had enacted an ordinance restricting parking in residential districts, enforcement of

which was triggered when the city received written complaints from three individuals residing in three separate households within 1,500 feet of the property where the parking violation was alleged to have occurred. When enforcement was sought against a rectory located in a residential district, the court ruled that this exclusive delegation of enforcement authority constituted a subjective system of individualized assessment, because enforcement was not uniform but was left entirely to the whim of any three individuals who met the necessary criteria. See *Town of Foxfield v. Archdiocese of Denver*, 148 P.3d 339 (Colo. App. 2006).

41. See, e.g., *Sts. Constantine & Helen Greek Orthodox Church,*

Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005) (finding denial of rezoning application to violate RLUIPA).

42. See *Greater Bible Way Temple of Jackson v. City of Jackson*, 487 Mich. 373, 733 N.W.2d 734 (2007).

43. See, e.g., *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1221 (C.D. Cal. 2002) (“Church activities have a significant impact on interstate commerce.”).

44. See, e.g., *Guru Nank Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Elsinore Christian Center v. City of Lake Elsinore*, 197 F. App’x

718 (9th Cir. 2006), *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005); *Dilaura v. Twp. of Ann Arbor*, 112 F. App’x 445 (6th Cir. 2004 (per curiam)); *Living Water Church of God v. Charter Twp. of Meridian*, 384 F.Supp.2d 1123 (W.D. Mich. 2005), *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. 2004).

45. See *C.L.U.B. v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003); see also *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2006) and *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846 (7th Cir. 2007).

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generally⁴⁵—and more broadly: A substantial burden could be based on delay, uncertainty, and expense.⁴⁶

These different interpretations, when combined with the unique factual settings of each case, have yielded outcomes that are difficult to reconcile. For example, the 11th Circuit found no substantial burden when a synagogue was prohibited from locating in a downtown business district,⁴⁷ while the Ninth Circuit upheld a district court ruling that found a substantial burden where the city had denied approval for a church's preferred site in a downtown business district.⁴⁸

It is easier to provide guidance on avoiding a RLUIPA claim based on the other provisions of RLUIPA. Local officials obviously need to avoid even the appearance of unequal treatment or discrimination—whether for or against—a particular church or sect, or treating religious uses on less than equal terms with secular uses. But even here, some court decisions suggest guidance is not so easy. For example, in the 11th Circuit case noted above, religious uses were not allowed in the central business district—where secular assembly uses were allowed—but churches could locate in residential districts where secular assembly uses were prohibited.⁴⁹ From either a planning or legal perspective, one might argue that while the treatment of the secular and religious uses was different, that different treatment did not violate RLUIPA's equal terms provision because the code "equalized" its treatment of the uses. While reli-

gious uses were barred from a district where secular uses were allowed, religious uses were allowed in a district where secular uses were prohibited.

The best advice to local officials on how to avoid a potential RLUIPA claim may well be less legal and more just common sense: Treat church representatives fairly and with respect and try to engage in a good-faith effort to craft a reasonable compromise between the church's request and achieving the city's land use policies. As a federal judge noted in one of the first reported RLUIPA cases involving a city's enforcement action to limit the number of attendees at prayer services held in a private home:

Even absent a federal statute, one would expect that, before banning an ongoing private religious gathering, public officials in a free and tolerant society would enter into a dialogue with the participants to determine if the legitimate safety concerns of the neighbors could be voluntarily allayed. Particularly where the participants are enjoined by religious teachings to "do unto others" as they would have done unto them, it is not unreasonable to expect the parties to be able to agree on means of reducing the impact of weekly prayer meetings on this small cul-de-sac without undermining the benefit that participants seek to derive from the practice of their faith.⁵⁰

It's important to note that the judge enjoined both sides to enter into dialogue to seek a reasonable compromise. Avoiding a potential claim is clearly not

solely the burden of local officials. Church officials have, in some cases, been dismissive of legitimate land use concerns and pursued claims that bordered on the frivolous. But where both sides are willing to seek common ground, there is certainly often room for compromise.

CONCLUSION

We are clearly in the midst of a dynamic environment socially, politically, and legally regarding the role of religion in our society, and RLUIPA reflects this in the context of potential conflicts between churches and land use regulation. Congress has attempted to empower churches when they choose where and how they build a sanctuary or assemble for worship and to restrain local governments when they seek to apply zoning or landmark regulations to a church when the congregation objects. In this environment, local governments face a difficult task in seeking to avoid RLUIPA potential claims and evaluating their likelihood of prevailing if challenged. Local officials can, however, take several steps to lessen the likelihood of a potential claim, including a comprehensive review of the treatment of religious institutions in its land use codes, both substantively and procedurally; training officials and employees to be sensitive to religious differences; and recognizing that land use applications from, and enforcement of regulations against, religious institutions must be handled with special care.

46. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005).

47. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.2d 1214 (11th Cir. 2004); however, that court also found that the ban violated RLUIPA's equal terms provision.

48. *Elsinore Christian Center v. City of Lake Elsinore*, 197 F. App'x 718 (9th Cir. 2006), reversing, 291 F.Supp.2d 1083 (C.D. Cal. 2003).

49. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.2d 1214 (11th Cir. 2004).

50. *Murphy v. Zoning Comm'n of Town of New Milford*, 148 F.Supp.2d 173, 191 (D.Conn. 2001).