RLUIPA UPDATE

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Background

The Religious Land Use & Institutionalized Person Act[1] (RLUIPA) passed both houses of Congress in July of 2000 and was signed into law by President Clinton on September 22nd. RLUIPA affects local land use regulations by setting forth a general rule prohibiting 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 compelling governmental interest.

RLUIPA provides that this general rule applies in any case in which the substantial burden is imposed from a program or activity that is federally-funded, the substantial burden, or its removal, affects interstate commerce, or the substantial burden is imposed as a result of land use regulations that permit the government to make individualized decisions regarding the use of the affected property.[2] In short, RLUIPA requires that local government demonstrate both that it has a compelling governmental interest to justify regulations that substantially burden free exercise and that it has used the least restrictive means to advance that interest.

In addition, RLUIPA contains provisions mandating that local land use regulations must: grant Aequal treatment@ to a religious assembly or institution;[3] not discriminate against any assembly or institution on the basis of religion or religious denomination;[4] 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.[5] Finally, RLUIPA also prescribes rules for legal claims brought under the statute, including shifting the burden of persuasion to local government once a plaintiff produces prima facie evidence of a violation[6] and providing for the recovery of attorneys= fees under 42 U.S.C. '1988.[7]

What Types of Challenges Have Been Brought Under RLUIPA?

In the two and one-half years since RLUIPA was signed into law, about a dozen RLUIPA challenges to local government land-use regulation of religious uses have produced reported decisions;[8] however, the author=s ongoing review of news and Internet sources shows that approximately thirty additional cases have been filed and a similar number of RLUIPA lawsuits threatened.[9] The claims

asserted in these complaints and threatened suits may be grouped into several distinct Aland use@ categories. These include: the right to conduct worship services in one=s home;[10] the right to establish a religious use in a residential zone[11] or, conversely, in a non-residential zone;[12] the right to establish a Asocial service@ religious use;[13] challenging regulations that prohibit Areligious uses@ while allowing similar uses;[14] challenging an Aeffective ban@ on religious uses,[15] and challenging the denial of a development permit[16] or an application submitted under an historic preservation ordinance.[17]

Have the Courts Ruled on the Constitutionality of RLUIPA?

The only reported case to date to address the constitutionality of RLUIPA=s land use provisions upheld the statute. In *Freedom Baptist Church of Delaware County v. Township of Middletown*,[18] the plaintiff church sued the Township after it denied the church=s application for a use variance to allow worship services in a rented office building. The church claimed that the Township=s zoning ordinance: (1) did not allow religious worship as a use permitted as-of-right at any location; (2) imposed onerous minimum acreage and parking requirements where it permitted religious worship as a conditional use; and (3) treated schools less stringently than churches. The church charged that these restrictions imposed a substantial burden on religious exercise and also violated the RLUIPA provisions barring discrimination against and imposing unreasonable limits on religious assemblies.[19]

The Township filed a motion to dismiss, challenging the facial constitutionality of RLUIPA on several grounds, including the Establishment and Free Exercise Clauses of the First Amendment, the Commerce Clause, and the Equal Protection Clause.[20] District Court Judge Dalzell, after reviewing portions of the statute=s legislative record that documented the Amassive evidence@ that

local governments were violating the Aright to assemble for religious purposes@ and Aexamined Congress=s constitutional authority to enact this bill in light of recent developments in Supreme Court federalism doctrine,@ noted that the A[d]efendants= motion to dismiss requires us to test whether Congress has, indeed, conformed this legislation with the Supreme Court=s rapidly evolving federalism jurisprudence of recent years.@[21]

In short, the question that Judge Dalzell had to answer was whether Congress had drafted RLUIPA with sufficient precision to avoid the constitutional infirmities that had doomed its predecessor statute, the Religious Freedom Restoration Act (RFRA).[22] RFRA was enacted in 1993 to reinstate the strict scrutiny standard of review for religious freedom challenges that the U.S. Supreme Court had abandoned in *Employment Division, Department of Human Resources of Oregon v. Smith.*[23] In the *Smith* Court's view, striking a balance between protection of religious practices and the requirements imposed by laws of general application was a task for legislatures, not courts.[24] But the balance that Congress sought to achieve through RFRA did not survive the Court=s scrutiny.

In *City of Boerne v. P.F. Flores,*[25] the Court ruled that Congress had violated basic principles inherent in the separation of powers among the branches of the federal government when it enacted RFRA. Congress had relied on its broad grant of power under the enforcement clause of the Fourteenth Amendment in enacting RFRA, but the Court ruled that Congress had exceeded that authority by attempting to *alter* the constitutional right to free exercise of religion, rather than *enforce* it.

RLUIPA, like RFRA, seeks to negate the effect of the *Smith* decision and reinstate the compelling interest test; however, it differs from RFRA in two key

elements. First, Congress relied on its power under the Spending and Commerce Clauses, as well as the Fourteenth Amendment, in enacting RLUIPA. Second, as opposed to RFRA=s extensive reach, RLUIPA is limited to land use regulation and prisoners= rights. The question for Judge Dalzell was whether these changes were sufficient to yield an outcome for RLUIPA different from RFRA=s.

Judge Dalzell began his discussion of the defendants= challenges to RLUIPA by rejecting their claim that RLUIPA violates the Establishment Clause by showing favoritism towards religious organizations and their members. Although acknowledging that Justice Stevens= concurring opinion in *Boerne* had expressed similar concerns about a near-parallel provision in RFRA,[26] Judge Dalzell found persuasive the fact that Justice Stevens= view had not been adopted by the other Justices nor by any of the post-*Boerne* appellate decisions which held that RFRA remains effective as to the federal government.[27] While Judge Dalzell=s observations are accurate, several commentators have concluded that RLUIPA, or the antecedent Religious Liberty Protection Act,[28] raise serious Establishment Clause concerns.[29]

Judge Dalzell turned next to whether Congress had exceeded its authority under the Commerce Clause in enacting RLUIPA. In a trio of recent cases, the U.S. Supreme Court has rejected Congressional attempts to assert Commerce Clause authority for laws that extend the reach of the federal government, either because the regulated activity did not substantially affect interstate commerce[30] or was fundamentally of local concern, such as land-use regulation.[31] The concern that lies at the core of the Court=s rulings in these cases is federalism: if not constrained in some principled way, Congress could assert its authority A[t]o regulate Commerce . . . among the several States,@ so broadly as Ato completely

obliterate the Constitution=s distinctions between national and local authority.@[32]

Judge Dalzell distinguished the first two of these cases, *Lopez* and *Morrison*, arguing that the non-economic, criminal nature of the activities at issue was central to the Court=s decisions, and concluded that Congress still retained broad power over economic activity, even where zoning regulation was implicated, citing the Telecommunication Act of 1996[33] as a recent example of legislation that governs local zoning Awithout (to date) any judicially-recognized constitutional objection.@[34] He concluded that Ainsofar as state or local authorities >substantially burden= the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause,@ and upheld RLUIPA subsection (a)(2)(B).[35]

Two omissions raise questions about Judge Dalzell=s analysis of the Township=s Commerce Clause challenge. First, Judge Dalzell failed to cite, let alone discuss the implications of, the most recent, and arguably most relevant, of the Court=s decisions striking down a statute as exceeding Congressional power under the Commerce Clause. In *Solid Waste Agency of Cook County v. U.S Army Corps of Engineers*,[36] the Court struck down a Corps' rule extending the definition of "navigable waters" under the federal Clean Water Act to include intrastate waters used as habitat by migratory birds, arguing that APermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the >Migratory Bird Rule= would result in a significant impingement of the States' traditional and primary power over land and water use.@[37] RLUIPA clearly intrudes deeply and pervasively into this same area of local governmental authority in this area. And this concern is not lessened by Judge Dalzell=s claim that the intrusion of the Telecommunications Act into local zoning decisions did not raise federalism

questions: the Federal Communications Commission, which administers the Act, has regulated communications since 1934[38] and the 1996 act preempts only those local zoning decisions that Aprohibit or have the effect of prohibiting@ the provision of personal wireless services,[39] while explicitly preserving local zoning authority Aover decisions regarding the placement, construction, and modification of personal wireless service facilities.@[40]

The second omission in Judge Dalzell=s analysis is his failure to address two recent law review articles,[41] cited by the Township, that argue, based on the doctrines announced in *Lopez* and *Morrison*, there are serious concerns as to whether Congress exceeded its power under the Commerce Clause in enacting RLUIPA. Judge Dalzell simply dismissed any concerns these articles raise, stating that the court is Ain no position to quibble with Congress=s ultimate judgment that the low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations around the county.@[42] Given that these two articles are not alone in raising these Commerce Clause concerns regarding RLUIPA,[43] the arguments presented deserved a more extended analysis. Judge Dalzell next considered the Aindividualized assessments@ provision of RLUIPA.[44] After noting that Congress sought in this provision Ato codify the individualized assessments jurisprudence in Free Exercise cases,@[45] including the Court=s most recent Free Exercise decisions, *Smith*[46] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[47] Judge Dalzell concluded that RLUIPA Afaithfully codifies the >individual assessments= jurisprudence@ announced by the Supreme Court and Ais therefore not constitutionally exceptional.@[48]

Judge Dalzell=s conclusion that RLUIPA=s Aindividualized assessments@ provision does nothing more than codify the Court=s Aindividualized exemptions@ implicitly mirrors the claims of RLUIPA=s advocates that A[m]ost determinations of zoning matters that burden religious exercise do not fall under Smith=s category of >neutral laws of general applicability,=@[49] and thus should be governed by the Aindividualized assessments@ provision.[50] Other commentators refute that claim, however, arguing that the Aindividualized assessments@ provision should only apply when a land use regulation allows for *ex-post facto* Awholly discretionary decisions by unelected officials who discriminate between religious and secular reasons for granting individual exemptions from otherwise generally applicable laws.@[51] This author=s reading of those portions of *Smith* and *Lukumi Babalu Aye* that discuss the Aindividualized exemptions@ question suggests that the claim of RLUIPA=s advocates that Amost@ land use decisions should be governed by its Aindividualized assessments@ provision cannot be sustained.[52] As will be seen later, the scope one accords to the Aindividualized assessments@ provision of RLUIPA plays a critical role in judging the statute=s constitutionality on federalism grounds.

Judge Dalzell also upheld the RLUIPA provisions prohibiting: (1) discrimination against religious institutions and assemblies, (2) the total exclusion of religious assemblies from a jurisdiction, and (3) placing unreasonable limits on religious assemblies, institutions or structures.[53] Judge Dalzell argued that the anti-discrimination provisions do no more than Acodify existing Supreme Court decisions under the Free Exercise and Establishment Clauses of the First Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment,@[54] while the bans on exclusion of religious assemblies and placing

unreasonable limits on religious assemblies, institutions or structures each codified other Supreme Court decisions.[55] The judge cited *Schad v. Borough of Mount Ephraim*[56] as establishing the rule that a local government cannot entirely exclude a type of conduct that the First Amendment protects and *City of Cleburne v. Cleburne Living Center*[57] as prohibiting Aunreasonable limits@ on religious assemblies, institutions or structures.

Finally, Judge Dalzell disputed the Township=s claim that RLUIPA contains the same fatal flaw that doomed RFRA, exceeding the remedial authority of Congress under ' 5 of the Fourteenth Amendment because it attempts a s*ubstantive* change in constitutional protections. Judge Dalzell argued that RLUIPA should not meet RFRA=s fate both because it was a less intrusive statute, dealing only with religious exercise in the context of land use and institutionalized persons, and because it does not attempt a substantive change in the law, doing nothing more than codifying established rights. Thus, Judge Dalzell concluded that Aunlike RFRA, the RLUIPA does not >contradict[ ] vital principles necessary to maintain separation of powers and the federal balance.=@[58] In Judge Dalzell=s view, while RLUIPA Aplaces a statutory thumb on the side of religious exercise in zoning cases,@ because ARLUIPA is as narrowly drawn as the Telecommunications Act was, we do not believe the new statute unduly offends the federal structure.@[59]

Judge Dalzell=s conclusion that RLUIPA does not contain the same fatal defect as RFRA hinges on his having found no constitutional flaws in the jurisdictional bases for the statute. As noted above, however, the analysis of the Commerce Clause jurisdictional basis for RLUIPA espoused by Judge Dalzell had previously been criticized by several commentators.[60] Further, his expansive view of the Aindividual assessments@ basis for RLUIPA jurisdiction as reaching most

zoning decisions is at odds with the judge=s claim that ARLUIPA is as narrowly drawn as the Telecommunications Act@ and, more fundamentally, does not find support in the discussion of that issue in *Smith* and *Lukumi Babalu Aye*. In short, much of Judge Dalzell=s analysis of the constitutionality of RLUIPA has already been criticized in the law review literature.

Finally, all parties in this litigation agreed that RLUIPA=s constitutionality constitutes a Acontrolling question of law as to which there is substantial ground for difference of opinion@ so that an immediate appeal will likely Amaterially advance the ultimate termination of litigation,@[61] which allowed Judge Dalzell to certify the question of RLUIPA=s constitutionality to the Third Circuit as an interlocutory appeal.[62]

The Third Circuit will not have an opportunity to rule on this question, however. On November 15, 2002, Judge Dalzell approved a settlement[63] between the parties in which the township agreed to change its zoning ordinances to comply with RLUIPA and paid the church=s $10,000 legal expenses.[64] The settlement put to rest growing speculation over how the Third Circuit might rule in *Freedom Baptist* in light of the Circuit=s ruling, one month before the *Freedom Baptist* settlement, on another religious land-use case, *Congregation Kol Ami v. Abington Township.*[65]

Kol Ami involved claims that Abington Township=s zoning laws violated both the state and federal constitutions as well as RLUIPA. At issue was the Township=s denial of the Congregation=s request to covert a former convent for use as its synagogue. The Congregation argued that their rights to equal protection were denied because there was no rational basis for the zoning decision prohibiting their proposed synagogue at this location. The Township argued that the proposed

use as a synagogue would create unacceptably high levels of traffic, noise and other neighborhood disruptions as compared with the property=s previous use as a convent. The Congregation prevailed on a motion for summary judgment, the court finding that the Township=s zoning ordinance, as applied to the plaintiffs, was an unconstitutional denial of equal protection.[66] Analyzing the Congregation=s claim based on the U.S. Supreme Court=s 1985 decision in *City of Cleburne v. Cleburne Living Center,*[67] the district court found that uses Asimilar@ to the proposed synagogue could be allowed as a special exception in the zoning district at issue, and thus the Township=s refusal to allow the synagogue was irrational and a denial of equal protection.

The Third Circuit vacated the district court=s ruling and remanded for additional factual findings as to the compatibility of the proposed synagogue with the surrounding residential area, ruling that the district court had erred because it Aoverlooked the threshold step that must betaken under the *City of Cleburne* analysis B the court must first conclude that the two land uses are >similarly situated.=@[68]

What intrigued observers about the Third Circuit=s decision was not its disposition of the case, but rather the tone of the opinion, authored by Chief Judge Becker, which strongly supported the right of local land use regulators to make appropriate distinctions among land uses, including the decision to exclude houses of worship from residential areas, the precise issue in *Kol Ami*.[69] Since the equal protection claim in *Kol Ami* was factually and conceptually similar to a discriminatory treatment claim under RLUIPA, the tone of the *Kol Ami* opinion, and in particular its strong language that land use was a local, not federal, concern, hinted that at least three judges on the Third Circuit might be concerned about RLUIPA=s usurpation of local land use authority when that Circuit ruled on the

statute=s constitutionality in the *Freedom Baptist* case. That case=s settlement, of course, put such speculation to rest for the time being.

What Have Been the Outcomes of Other RLUIPA Challenges ?

As noted earlier, only a small number of RLUIPA cases have produced reported decisions to date, with even fewer having reached the merits of the RLUIPA claim. The most important decision to date is, of course, *Freedom Baptist*, discussed at length above. Another important decision is *Murphy v. Zoning Comm=n of the Town of Milford.*[70] In this case, neighbors complained because up to 40 people attended the weekly Sunday afternoon Aprayer meetings@ in the Murphy=s home, expressing concern about emergency vehicles= access and the safety of children playing in a cul-de-sac because of the large number of cars parked on the street. The neighbors called the police several times but no citations were issued and investigations by the town=s Zoning Enforcement Officer (ZEO) found that cars were not blocking neighbors= driveways. In November, 2000, the ZEO requested that the town=s Zoning Commission issue an opinion on whether the Murphy=s prayer meetings conformed with the town=s zoning regulations. The Commission found that such regularly scheduled meetings are not a customary accessory use in a single-family neighborhood and issued a cease and desist order that limited to 25 the number of persons attending the prayer meetings. The Murphy=s did not appeal the order, choosing instead to institute a RLUIPA challenge in federal court under 42 U.S.C. ' 1983.[71]

After denying exhaustion and ripeness challenges to the Murphy=s action,[72] the court found that limiting the number of persons at prayer meetings to 25 would impose a substantial burden on the Murphy=s free exercise rights

because it would defeat the purpose of the meetings (to help those in need, including the A26th person@) and the cease and desist order imposed a chilling effect on attendance at the meetings.[73] Under RLUIPA, the court=s finding of a substantial burden triggers strict scrutiny, requiring that government demonstrate a compelling state interest for its regulation and that the regulation at issue is the least restrictive means for achieving that interest.

The *Murphy* court had little trouble finding that the town had shown Aa compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations,@ but found that the limit on the number of persons attending payer meetings did not meet the least restrictive means test, arguing that the town should have placed a limit on traffic or on-street parking rather than attendees. [74] Interestingly, the judge chastised the failure of town officials to seek a voluntary accommodation between the Murphy=s religious rights and the town=s legitimate zoning interests.[75]

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*,[76] the court granted the plaintiff=s motion for a preliminary injunction prohibiting the Redevelopment Agency from acquiring the church=s property under eminent domain for commercial development, which would have frustrated the church=s plans to develop its property with a new 300,000 sq. ft. religious facility. Here, Cottonwood spent a year assembling an eighteen acre site for its proposed facility from six individual parcels located in a 300 acre largely vacant area the City of Cypress had targeted for redevelopment. Churches were a permitted use under the zoning designation for the area and Cottonwood applied for a development permit on October 6, 2000. On October 26th, the City Planning Manager rejected the application as incomplete because it did not contain design review studies that the city wanted. On October 30th, the City adopted a 45-day moratorium on new land

use permits in the area of the Cottonwood property in order to allow the city time to consider new plans for redevelopment of the area. The moratorium was subsequently extended to October 30, 2002, thus effectively barring the church=s development for at least two years.[77]

Trying to avoid this bar, the church appealed the City Planning Manager=s decision that its application was incomplete to the City Council. While this appeal was pending, City staff contacted Cottonwood twice to ask if they were interested in developing their property with various commercial ventures. Cottonwood responded that it was interested in developing the land as a church. Finally, on February 11, 2002, the City Council considered Cottonwood=s appeal. Council found that the requested design review studies were not required, deemed the application complete, and directed staff to undertake a review. But on February 28, 2002, the Redevelopment Agency offered to purchase the Cottonwood property for $14,583,500. Cottonwood refused. The Redevelopment Agency then determined to acquire the land by eminent domain and the City filed an action in state court to condemn the land on May 29, 2002.[78]

Cottonwood first sued in January, 2002, challenging the constitutionality of the land use decisions made by the Agency and the City, and later amended its complaint to seek a preliminary injunction barring the City=s condemnation of its property. After denying the City=s motion to dismiss, District Court Judge Carter ruled that RLUIPA=s strict scrutiny standard of review governed Cottonwood=s claim because the City=s actions regarding the proposed church met both the commerce clause and Aindividualized assessments@ jurisdictional bases in the statute.[79] The Court further ruled that even were jurisdiction under RLUIPA not invoked, strict scrutiny would still be appropriate under a free exercise clause analysis because the City=s actions were Aindividualized

assessments@ [80] and there was Astrong evidence that Defendants= actions are not neutral, but instead specifically aimed at discriminating against Cottonwood=s religious uses.@[81] The Court also found that the City=s zoning and eminent domain actions substantially burdened Cottonwood=s exercise of religion because they made it impossible for the church Ato practice its religious beliefs in its current location.@[82]

The Court then examined whether the City had satisfied its strict scrutiny burden by demonstrating that its actions were supported by a compelling governmental interest and were the least restrictive means for accomplishing that interest. The City had advanced two interests for refusing to grant Cottonwood=s permit request and for condemning its property: preventing blight and generating revenue for the City. The Court quickly dismissed the blight rationale, questioning whether the City=s twelve year old finding of blight was still valid and arguing that the new 300,000 sq. ft. church would have eliminated any blight that did exist.[83] The Court was similarly dismissive with the City=s claimed interest in revenue generation, noting that the City has maintained a 25% budget surplus without imposing additional taxes and arguing more generally that by granting too much weight to a claimed interest in revenue generation, courts could allow cities to deny land-use permits for any not-for-profit entity.[84] Finally, the Court ruled that even if it had found that these interests were compelling, the City had not utilized the least restrictive means to advance these interests, but rather had Adone the equivalent of using a sledgehammer to kill an ant,@ noting again that construction of the proposed church would have alleviated any blight and that Athe City has not demonstrated that there is no other way to provide for revenue without taking the property and preventing Cottonwood from building its church.@ [85]

After the Court granted Cottonwood its preliminary injunction, the church and the City skirmished back and forth a bit, but in October 2002, Cottonwood Christian Center and the city agreed the church will sell its land where the city wanted retail and the church will have the opportunity to purchase 28 acres on the Cypress Golf Course. Both sides also agreed to drop their lawsuits as part of the settlement.[86]

In two other California cases, RLUIPA claimants have been less successful. In *Ventura County Christian High School v. City of San Buenaventura*,[87] a private religious school sought a preliminary injunction barring the city from enforcing its zoning requirements as applied to modular classrooms the school sought to erect on land leased from the public school district. The Court denied the motion, finding that there was no evidence that the religious school had been treated unequally in comparison to secular applicants as regards approvals for modular classrooms and that compliance with the approval requirements did not substantially burden the school=s exercise of religious freedom.

In an unreported case, *San Jose Christian College v. City of Morgan Hill*,[88] the court granted the defendant city=s motion for summary judgment against a religiously affiliated college that had challenged the denial of its application to re-zone a property for educational use. Here, the college had purchased a vacant former hospital intending to use the property for its college campus, but the city denied the college=s rezoning application on the grounds that the property was the only site in the city zoned for hospital use and the college had not complied with the city=s rezoning procedures. The college challenged both the procedural and substantive elements of the city=s zoning code that governed its application for rezoning.[89]

The court ruled that the RLUIPA claim failed because the college: (1) provided no evidence that the city=s zoning code placed undue limitations on religious institutions, treated them unequally, or discriminated against them and (2) could not establish a prima facie case that the city=s action imposed a substantial burden on its religious exercise.[90] While this decision does not elaborate on the basis for the ruling on the substantial burden issue, this same court=s prior ruling denying the plaintiff=s motion for a preliminary injunction argued that the proposed use of the property as a college did not constitute an Aexercise of religion@ as that term has been defined in the Ninth Circuit=s caselaw[91] or as comprehended in RLUIPA.[92]

In other reported decisions, courts have declined to, or not yet, reached the RLUIPA claim. Some courts have ruled that the case could be resolved on other grounds, including the Free Exercise Clause,[93] Equal Protection Clause,[94] or state law.[95] In other cases, the courts found that the RLUIPA claim was not ripe,[96] or that strict scrutiny would apply regardless of the RLUIPA claim,[97] or the RLUIPA claim had no jurisdictional basis, including where: a city had previously removed any potential substantial burden on religious exercise by amending its zoning ordinance,[98] a city did not act pursuant to a zoning or landmarking law when it decided to develop a previously dedicated roadway located between two church-owned lots,[99] or the city=s denial of a permit to construct a transmission tower on a golf course was ruled not to invoke RLUIPA jurisdiction for a neighboring synagogue seeking to intervene in a plaintiff telephone company=s challenge to the denial.[100]

How Much Has RLUIPA AChanged the Rules@ for Land-Use Regulation of Religious Uses?

It is clear that RLUIPA has imposed a new Congressional mandate on local government land-use regulation of religious uses. What is less clear is precisely how much that mandate actually constrains a local government when it seeks to exercise its land use regulatory authority over religious uses in a legitimate manner; i.e., in a manner that does not unlawfully discriminate against such a use by denying an approval either because the applicant is a Anon-mainstream@ religion or solely because the use is religious, rather than secular. Obviously, such illegitimate and discriminatory actions by local government were unlawful even prior to RLUIPA.[101]

Undeniably, local government is being sent a message that RLUIPA has Achanged the rules@ in a fundamental way. Unlike RFRA, which did not produce a large number of challenges to land-use regulation of religious uses, RLUIPA has resulted in a flurry of threatened, and actual, litigation. This difference may be attributable, in part, to better organization by those who advocated for the statute=s enactment. Many of the RLUIPA plaintiffs have been assisted by a conservative legal-defense group, the Becket Fund for Religious Liberty (hereafter Becket Fund), headquartered in Washington, D.C, which has made RLUIPA claims a focus of its activity. A fairly comprehensive listing of RLUIPA challenges may be found on its website.[102]

Given the above, local governments should anticipate that RLUIPA will be invoked as mandating approval whenever a land-use regulation is applied to a religious institution or assembly. Many local governments are uncertain as to how to respond to an assertion that RLUIPA mandates approval because only two RLUIPA challenge have been decided on the merits. This uncertainty has led some to defer legislative action that might affect religious institutions,[103] while others have issued approvals based on concerns about the effect of RUIPA.[104]

While caution should always be exercised in evaluating the potential effect of a new law, the fact that only two reported cases to date have reached the merits of a RLUIPA challenge does not leave local government without guideposts for assessing claims that RLUIPA mandates a particular outcome. Local government may look for guidance to a substantial body of caselaw utilizing the APre-*Smith*@ free exercise analysis that included the possibility of applying the compelling interest test to land use regulation of religious uses. These include federal and state rulings on free exercise challenges before *Smith*, or under RFRA, and cases decided under state RFRAs or state constitutions that utilize a Apre-*Smith*@ form of free exercise analysis. These cases strongly suggest that, even under RLUIPA, local governments retain significant authority to deny a religious institution=s request for land use approval when such an approval would contravene a well-conceived and fairly-administered regime of land-use controls.

APre-*Smith*@ Free Exercise Analysis in the Courts

Whether decided before *Smith*[105] or under RFRA,[106] courts normally upheld a local government=s land-use regulations against free exercise challenges. There were two exceptions to this pattern. First, a trio of decisions found that RFRA barred enforcement of zoning restrictions on religious institutions that sought to establish homeless shelters or food programs in residential areas.[107] Second, in *Keeler v. Cumberland*, *Keeler II*,[108] decided on motion for summary judgment, a federal district court ruled that a local landmark law was not a Aneutral law of general applicability@ under *Smith*, due to its

variance and hardship provisions, and applied the compelling interest test to find that the city=s denial of a permit to demolish a landmarked monastery violated the federal and state constitutions because it impinged on religious belief.

These exceptions were not without their critics, however. One federal district court rejected the claim that RFRA barred the application of locational restrictions to a homeless shelter and food bank proposed to be housed in a church[109] and a law review article sharply criticized one decision among the trio.[110] *Keeler II* has also been sharply criticized for its finding that the landmark law was not a neutral law of general application.[111]

In addition to the cases decided under the federal constitution or RFRA, a number of courts have applied a Apre-*Smith*@ analysis under state RFRAs or state constitutional religious freedom provisions. Here too, with the notable exception of the Washington Supreme Court=s rulings on the application of landmark preservation ordinances to houses of worship,[112] which are based on the expansive freedom of religion provision in the state constitution, the decisions have normally upheld a local government=s land-use regulations.[113]

The Continuing Relevance of State Constitutions, Statutes, and Caselaw

It is important to remember that RLUIPA is only the starting point for any analysis of a religious freedom claim. Several states and some local governments have been active in this area and their enactments or rulings must also be considered.

In the wake of the Supreme Court=s *Smith* decision in 1990, a number of state Supreme Courts rejected *Smith*=s approach to religious freedom claims brought on state constitutional grounds.[114] Further, many state constitutions provide a more expansive guarantee for freedom of religion than that found in the

First Amendment[115]and a number of states have approved statutes or constitutional amendments comprehensively addressing religious freedom.[116] Other states have enacted statutes focused on land use and religious freedom.[117] In addition, there are reported decisions in several of these states interpreting their statutory or constitutional protections in the land-use context,[118] with more certain to follow.

In addition to these more recent cases, an older group of state court decisions, involving a substantive due process-based approach to determining the validity of land-use regulation that affected religious institutions, retain their vitality in some jurisdictions,[119] even though there clearly has been a movement in state courts to apply a religious freedom analysis, rather than due process, to such cases.[120] Under this earlier due process analysis, decisions in a minority of state courts, exemplified by California, treated zoning restrictions on houses of worship differently than any other land use and presumed that the restriction was justified unless the religious institution can prove that it is not.[121] In the majority of states, New York being the leading example, courts placed houses of worship in a preferred category so that local government bears the burden of justifying its restriction.[122]

Local Ordinances

In addition to the variety of constitutional, statutory, and caselaw authorities among different states described above, some local ordinances also address religious freedom in the land-use context, most commonly in the form of special landmark preservation rules for religious institutions, such as Chicago=s owner consent provision for any "building that is owned by a religious organization and is used primarily as a place for the conduct of religious ceremonies.".[123]

Avoiding a RLUIPA Challenge

Avoiding a RLUIPA challenge is certainly a preferable alternative to litigating one. Thus, the first response any local government should make to RLUIPA is to examine the texts of its land use regulations affecting religious uses and how those regulations have been applied. At minimum, the zoning ordinance must provide reasonable locational options for 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 concern for maintaining the city=s tax base. Where locational options are effectively non-existent 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 are making adequate locational options for Asocial 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 Aminister to the poor@ at a location of their choosing is blunted when a zoning code designates reasonable locational 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[124] without consent of the religious institution and should contain a Ahardship@ provision that would be apply to any designated structure.

Finally, the local government should make sure that no religious denomination has been singled out for either favorable or disfavorable treatment in the land-use regulatory process and that applications from religious uses are treated no differently than similar applications from secular uses.

Conclusion

We are clearly in the midst of a dynamic environment B socially, politically, and legally B regarding the conflict between religious institutions and land use regulation. Regrettably, elements on both sides at times have advocated extreme positions. Some religious institutions claim that their right to choose when and where they assemble for worship is almost absolute and that government may never lawfully landmark a property devoted to religious use if the congregation objects. Some local officials and citizens groups argue that Areligious freedom@ should apply only to beliefs and practices, and thus decisions about where a house of worship may locate or whether it should be landmarked involve nothing more than property rights and so a religious institution should be treated no differently than a discount store or movie theatre. There is surely room for accommodation between these extremes.

[1] Pub. L. No. 106-274, 114 Stat. 803-807, codified at 42 U.S.C. " 2000cc-2000cc-5.

[2] 42 U.S.C. ' 2000 cc (a) (2) provides that the compelling interest test is applied in any case in which: A(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability; (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a

rule of general applicability; or (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.@

[3] 42 U.S.C. ' 2000 cc (b) (1) provides: ANo 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.@

[4] 42 U.S.C. ' 2000 cc (b) (2) provides: ANo government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.@

[5] 42 U.S.C. ' 2000 cc (b) (3)(A)&(B).

[6] 42 U.S.C. ' 2000 cc-2(b).

[7] 42 U.S.C. '1988(b).

[8] *See* text at notes 18 to 99 *infra.*

[9] The cases and disputes noted were obtained through weekly searches of WESTLAW=s ALLNEWSPLUS database and a website, <http://www.rluipa.org/index.html>, maintained by The Becket Fund for Religious Liberty, headquartered in Washington, D.C, which has made RLUIPA claims a focus of its activity.

[10] *See, e.g.,* Murphy v. Zoning Comm=n of the Town of Milford, 148 F.Supp.2d 173 (D.Conn. 2001)(issuing preliminary injunction invalidating limit on number of persons allowed to attend healing prayer services in private home); *see also*, Murphy v. Zoning Comm=n of the Town of Milford, 223 F.Supp.2d 377 (D.Conn. 2002)(denying town=s motion to dismiss for lack of subject matter jurisdiction).

[11] *See, e.g.,* Congregation Etz Chaim v. City of Los Angeles, CCV 97-5042 (HLH) (CD Cal 2000)(refusing to approve conditional use permit that would allow conversion of home to house of worship).

[12] *See, e.g.,* Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203 (C.D. Cal. 2002)(granting preliminary injunction barring city from pursuing eminent domain action to acquire property where plaintiff sought to develop a new church, but which city preferred as site for a new Costco discount store) *and* Refuge Temple Ministries of Atlanta v.

City of Forest Park, Georgia, No. BCVC(N.D. Georgia 2001)(requiring religious uses to obtain a special permit to locate in a commercial zone where other similar uses are allowed as-of-right).

[13] *See, e.g.,*William C. Robinson, et al. v. City of Colorado Springs, et al., No. 00-CV-3437, Division 14, *See, e.g.,* Ventura County Christian High School v. City of San Buenaventura, 233 F.Supp.2d 1241 (C.D. Cal. W.D. 2002)(denying motion for preliminary injunction to bar city from enforcing zoning ordinance requirements that prohibited installation of modular classrooms at Christian school) *and* William C. Robinson, et al. v. City of Colorado Springs, et al., No. 00-CV-3437, Division 14, El Paso County District Court (Colo. 2000)(intervening in suit brought by neighboring landowners challenging city=s approval for construction of church-operated homeless shelter).

[14] *See, e.g.,*Congregation Kol Ami v. Abington Township, 161 F.Supp.2d 432 (E.D. Penna. 2001), *vacated and remanded*, 309 F.3d 120 (3rd Cir. 2002)(denying a Jewish congregation=s application to use a former monastery and convent, located in a residential district, as a synagogue). While the complaint in this case included a RLUIPA claim, the trial court decision, vacated on appeal, was on equal protection grounds.

[15] *See, e.g.,*Unitarian Universalist Church of Akron v. City of Fairlawn, Case No. 5:00 CV 3021 (N.D. Ohio E.D. 2001)(denying an application to expand an existing house of worship where houses of worship are allowed in only one zoning classification but no area is so designated on the zoning map).

[16] *See, e.g.,* Hyde Park Baptist Church v. City of Austin, Texas, Civil Action A 01CA 212 (WD Tex. Austin Div 2001)(denying an application to expand an existing house of worship).

[17] *See, e.g.*, Temple B'nai Sholom v. City of Huntsville, et al., CV-01-S-1412-NE (ND Alabama 2001)(challenging conflicting municipal orders, one requiring church to Arepair or demolish@ structure and the other barring such demolition, where church seeks permission to demolish).

[18] 204 F.Supp.2d 857 (E.D. Pa. 2002).

[19] *Id*. at 859-60. Interestingly, despite these claims, the church continued to hold religious services in an office building in the Township following the settlement of state court litigation appealing the Township=s denial of a use variance to conduct services at that location. The settlement provided for the grant of the church=s variance application subject to conditions limiting the hours of operation and providing arrangement for overflow parking at an adjacent

funeral home. The court found that the settlement did not moot the church=s damage claims and allowed the case to proceed. *Id.* at fn. 2.

[20] While the jurisdictional bases for RLUIPA, codified at 42 U.S.C. ' 2000 cc (a) (2) (A)-(C), begin with Congressional authority under the Spending Clause (U.S. Const., art. I, ' 8, cl. 1), because there was no federally-assisted program or activity involved here, this litigation raised no claim under this provision . *Id.* at n. 10.

[21] *Id.* at 862.

[22] Pub. L. No. 103-41, codified at 42 U.S.C. " 2000 bb B 2000bb-4 (1994).

[23] 494 U.S. 872 (1990). In *Smith*, the Court denied the free exercise claim of two Oregon state employees who had been denied unemployment benefits after they were fired as drug and alcohol counselors because the state viewed their religiously-motivated peyote smoking as work-related misconduct. The Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a `valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879, quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982)(Stevens concurring).

[24] *Id*. at 890.

[25] 521 U.S. 507 (1997).

[26] *Id.* at 536-37 (Stevens, J., concurring).

[27] *Freedom Baptist Church*, 204 F.Supp.2d 857, 864 (arguing that if ARFRA were constitutionally infirm on Establishment Clause grounds as to the states, there would be no principled was to exempt the national government from the same infirmity.@).

[28] Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

[29] *See, e.g,:* Edward J. Sullivan, *The Religious Land Use and Institutionalized Persons Act of 2000: An Update*, 25 Zoning & Plan. L. Rep. 25 (2002); Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 Wm. & Mary Bill Rts. J. 189 (2001); Jennifer Dorton, Note, *The Religious Liberty Protection Act: The Validity of Using Congress= Commerce and Spending Powers to Protect Religion*, 48 Clev. St. L. Rev. 389 (2000); Marci Hamilton, ATestimony, U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, H.R. 1691: The Religious Liberty Protection Act of 1999,@ ALI-ABA Course of Study - Historic Preservation Law, SE31 ALI-ABA 363 (1999).

In addition, the most recent decision addressing the constitutionality of RLUIPA=s prisoners= rights provisions, Madison v. Riter, --- F.Supp.2d ---, 2003 WL 179990 (W.D.Va.), has ruled that those provisions violate the Establishment Clause. *Contra* Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002); Johnson v. Martin, 223 F.Supp.2d 820 (W.D.Mich. 2002); Charles v. Verhagen, 220 F.Supp.2d 955 (W.D.Wis. 2002); Gerhardt v. Lazaroff, 221 F.Supp.2d 827 (S.D. Ohio 2002).

[30] *See* United States v. Lopez, 514 U.S. 549 (1995)(holding that Congress had exceeded its powers under the Commerce Clause in enacting the Gun-Free School Zones Act of 1990, 18 U.S.C. A. ' 922(q)(1)(A), which made possession of a firearm within a federally-designated Aschool zone@ a federal criminal offense and United States v. Morrison, 529 U. S. 598 (2000)(striking down a provision of the Violence Against Women Act of 1994, 42 U.S.C. ' 13981, that provided a civil remedy in federal court for victims of gender-motivated violence).

[31] *See* Solid Waste Agency of Cook County v. U.S Army Corps of Engineers, 531 U.S. 159 (2001)(relying on a Commerce Clause analysis in striking down a Corps' rule extending the definition of "navigable waters" under the federal Clean Water Act to include intrastate waters used as habitat by migratory birds).

[32] *Morrison*, 529 U.S. at 613, citing *Lopez*, 514 U.S. at 564.

[33] PL 104-104, February 8, 1996, 110 Stat 56.

[34] *Freedom Baptist Church*, 204 F.Supp.2d 857, 867.

[35] *Id.* at 867-68.

[36] 531 U.S. 159 (2001).

[37] *Id*. at 174, citing Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44, (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments").

[38] Communications Act of 1934, c. 652, Title I, ' 1, 48 Stat. 1064.

[39] 47 U.S.C. ' 332(c)(7)(B).

[40] 47 U.S.C. ' 332(c)(7)(A).

[41] Evan Shapiro, Comment, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 Wash.L.Rev. 1255 (2001) and Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 Wm. & Mary Bill Rts. J. 189 (2001).

[42] *Freedom Baptist Church*, 204 F.Supp.2d 857, 867.

[43] *See* n. 29, *supra*.

[44] 42 U.S.C. ' 2000 cc (a)(2)(C).

[45] *Freedom Baptist Church*, 204 F.Supp.2d 857, 869.

[46] 494 U.S. 872 (1990).

[47] 508 U.S. 520 (1993).

[48] *Freedom Baptist Church*, 204 F.Supp.2d 857, 869.

[49] Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 949 (2001).

[50] *Id.* at 949-953. Judge Dalzell writes: ANo one contests that zoning ordinances must by their nature impose individual assessments regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluation of the propriety of proposed activity against extant land use regulations. They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds.@ *Freedom Baptist Church*, 204 F.Supp.2d 857, 868.

[51] Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. Rev. 1045, 1083 (2000).

[52] *See, e.g., Lukumi Babalu Aye*, 508 U.S. 520, 537-38 (1993)(arguing that, as noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." quoting Bowen v. Roy, 476 U.S. at 708).

[53] 42 U.S.C. " 2000cc (b)(1)-(3).

[54] *Freedom Baptist Church*, 204 F.Supp.2d 857, 870.

[55] *Id.* at 870-871.

[56] 452 U.S. 61 (1981)(striking down ordinance that banned all live entertainment within jurisdiction in effort to exclude adult entertainment).

[57] 473 U.S. 432 (1985)(finding no rational basis for ordinance that required a home for the mentally retarded to obtain a special use permit in a district where similar uses -- such as fraternity or sorority houses, hospitals, and nursing homes B were allowed as-of-right).

[58] *Freedom Baptist Church*, 204 F.Supp.2d 857, 874, quoting *City of Boerne*, 521 U.S. at 536.

[59] *Id*. at 874.

[60] *See* sources cited at n. 29 *supra*. In addition, RLUIPA=s Spending Clause jurisdictional provision, while not at issue here, has also been criticized. *See* Gregory S. Walton, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional*, 23 U. Haw. L. Rev. 479 (2001).

[61] *Freedom Baptist Church*, 204 F.Supp.2d 857, 876.

[62] *See* 28 U.S.C. ' 1292(b).

[63] The consent judgment may be accessed on the Beckett Fund=s RLUIPA website at <http://www.rluipa.org/cases/FreedomBaptistConsentJudgment.pdf>

[64] ABaptists, town settle suit over zoning law. A constitutional dispute ended when Middletown agreed to conform to a federal rule on churches.@ Philadelphia Inquirer, November 16, 2002, B02, 2002 WL 102158328.

[65] 309 F.3d 120 (3rd Cir. 2002), *vacating and remanding*, Congregation Kol Ami v. Abington Township, 161 F.Supp.2d 432 (E.D.Pa. 2001).

[66] Congregation Kol Ami v. Abington Township, 161 F.Supp.2d 432, 436 (E.D.Pa. 2001); *see also* Congregation Kol Ami v. Abington Township, 2201 WL 827492 (E.D.Pa. 2001)(denying plaintiffs= motion for reconsideration).

[67] 473 U.S. 432 (1985).

[68] Congregation Kol Ami v. Abington Township, 309 F.3d 120, 125 (3rd Cir. 2002).

[69] Consider, for example, the following excerpts from the opinion: (1) Athe federal courts have given states and local communities broad latitude to determine their zoning plans. Indeed, land use law is one of the bastions of local control, largely free of federal intervention@ 309 F.3d 120, 135; (2) AA necessary corollary of the extensive zoning authority bestowed upon local municipalities, including the authority to create exclusively residential districts, is the authority to make distinctions between different uses and to exclude some uses within certain zones. Indeed, zoning is by its very design discriminatory, and that, alone does not render it invalid.@ *Id.*; (3) AAs long as a municipality has a rational basis for distinguishing between uses, and that distinction is related to the municipality=s legitimate goals, then federal courts will be reluctant to conclude that the ordinance is improper,@ *Id.* at 136, citing with approval,

Lakewood, Ohio Congregation of Jehovah=s Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983); (4) AIn view of the enormously broad leeway afforded municipalities in making land use classifications . . . it is strongly arguable that the Township=s decision to group churches together with schools, hospitals, and other institutions is rationally related to the needs of these entities, their impact on neighboring properties, and their inherent compatibility or incompatibility with adjoining uses.@ *Id*. at 143; and (5) AFinally, we do not believe land use planners can assume anymore that religious uses are inherently compatible with family and residential uses. *See, e.g., Megachurches as Minitowns*, F1, F6 (May 9, 2002). Churches may be incompatible with residential zones, as they >bring congestion; they generate traffic and create parking problems; they can cause a deterioration of property values in a residential zone . . ..=@ *Id.* footnote omitted.

[70] 148 F.Supp.2d 173 (D.Conn. 2001); *see also* Murphy v. Zoning Comm=n of the Town of New Milford, 223 F.Supp.2d 377 (D.Conn. 2002)(denying defendant=s motion to dismiss).

[71] 148 F.Supp.2d 173 at 176-179.

[72] The court ruled that plaintiffs did not have to exhaust state administrative remedies before pursuing their RLUIPA claim under ' 1983, citing Patsy v. Bd. Of Regents of the State of Florida, 457 U.S. 496 (1982) and found that their claim was ripe, based on issuance of the cease and desist order. *Id*. at 181-187. On this latter issue, the court argued that an *individual* RLUIPA plaintiff whose personal religious exercise has been substantially burdened by government action should not be required to appeal the action before it is considered final for ripeness purposes; however, an appeal would likely be required where the plaintiff is a religious institution and the government action is a decision on an application for a land use approval. *Id*. at 184-187.

[73] *Id*. at 187-189.

[74] *Id*. at 190.

[75] *Id*. at 191, stating: AEven 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.@

[76] 218 F.Supp.2d 1203 (C.D. Calif. 2002).

[77] *Id.* at 1210-13.

[78] *Id.* at 1214-15.

[79] *Id.* at 1221-22. The court stated: AChurches, such as Cottonwood are >major participants in interstate markets for goods and services, use of interstate communications and transportation, raising and distributing revenues (including voluntary revenues) interstate, and so on.=@ (citations omitted). It also stated: ARLUIPA also requires the application of a strict scrutiny standard because the City=s refusal to grant Cottonwood its application for a CUP involves a >land use regulation or system of regulations, under which a government makes, or has in place, formal or informal procedures or practices that permit the government to make, individualized assessments.=@ (citation omitted).

[80] *Id.* at 1222-24.

[81] *Id*. at 1224.

[82] *Id*. at 1226.

[83] *Id*. at 1228.

[84] *Id.* The Court also noted that some of the church=s activities would generate sales tax revenues and that the large numbers of people attending the 4,700 seat sanctuary would create a ready market for surrounding commercial developments.

[85] *Id*. at 1229.

[86] AOrange County Cypress, Church Near Deal in Battle Over Land Development: Cottonwood will sell property to the city for a Costco store. The Christian center will get about 28 acres on a nearby golf course,@. Los Angeles Times, October 5, 2002, B3, 2002 WL 2508473.

[87] 233 F.Supp.2d 1241 (C.D.Calif. W.D. 2002).

[88] 2002 WL 971779 (N.D.Cal.). *See also*, San Jose Christian College v. City of Morgan Hill, 2001 WL 1862224 (N.D.Cal.)(denying plaintiff=s motion for preliminary injunction).

[89] *Id*. at 1.

[90] *Id*. at 2.

[91] San Jose Christian College v. City of Morgan Hill, 2001 WL 1862224, 2-4 (N.D.Cal.), citing Christian Gospel Church, Inc. v. City and County of San Francisco, 896 F.2d 1221 (9th Cir. 1990).

[92] *Id*. at 4-5, arguing that A[e]ven with religious overtones, the proposed use is still comparable to other higher education institutions . . ... and . . . [the college] has failed to establish a likelihood that the RLUIPA applies to the City=s denial of the rezoning application.@ *Id*. at 5.

[93] Fifth Avenue Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002)(affirming, under Free Exercise Clause analysis, preliminary injunction preventing city from dispersing homeless individuals sleeping by invitation on church=s landings and steps).

[94] Congregation Kol Ami v. Abington Township, 161 F.Supp.2d 432 (E.D. Pa 2001)(applying rational basis review in striking down an ordinance that barred religious uses from requesting a special exception in a district where other similar uses were allowed to make such a request, citing as authority City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)), *vacated and remanded*, 309 F.3d 120 (3rd Cir. 2002).

[95] Martin v. The Corp.of the Presiding Bishop, 434 Mass. 141, 747 N.E.2d 131 (2001)(deciding case under ADover Amendment,@ M.G.L.A. c. 40A, ' 3).

[96] *See* Hale O Kalua Church v. Maui Planning Commission, 229 F.Supp.2d 1050 (D.Haw. 2002)(holding motion for preliminary injunction not ripe due to the fact that the specific relief requested had not been officially denied) *and* State v. Willhite, 2002 WL 452472 (Ohio App. 10th Dist.)(finding that plaintiffs RLUIPA claim challenging a zoning enforcement action was not ripe where plaintiffs had not filed for a certificate of zoning compliance which could possibly be granted).

[97] Hale O Kalua Church v. Maui Planning Commission, 229 F.Supp.2d 1056 (D.Haw. 2002)(holding that the denial of a special use permit places a matter within the Aindividualized assessments@ exception of Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

[98] C.L.U.B. v. City of Chicago, 157 F.Supp.2d 903 (N.D.Ill.E.D. 2001); *see also* C.L.U.B. v. City of Chicago, 2002 WL 485380 (N.D.Ill.E.D.)(denying motion to alter or amend judgment).

[99] Prater v. City of Burnside, Ky., 289 F.3d 417 (6th Cir. 2002).

[100] Omnipoint Communications, Inc. v. City of White Plains, 202 F.R.D. 402 (S.D.N.Y. 2001).

[101] *See, e.g.*, Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988)(finding both First Amendment and Equal Protection violations where a city denied approval for a mosque after approving numerous churches whose land-use impacts were the same as that of the rejected mosque) *and* Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 741 F.Supp. 1522, 1534 (N.D.Ala. 1990)(striking down county's procedure for obtaining a rezoning to allow development of land for churches, which permitted decisions to be determined on the basis of the neighborhood's willingness to accept a church, terming this "a thin

reed upon which to base the exercise of religious freedom," and suggested that the answer was to set aside areas zoned for churches as of right or to set solely objective standards for rezonings.).

[102] <http:///www.rluipa.org>.

[103] See, e.g., AChurch Size Restrictions Abandoned,@ Baltimore Sun, March 28, 2001, 6B. 2001 WL 6154761. *See also*, cases listed at the Becket Fund website <http:///www.rluipa.org>.

[104] *See, e.g.*, AMissionary Campus Wins City Approval,@ Kansas City Star, January 6, 2001, 1. 2001 WL 2588802. *See also*, cases listed at the Becket Fund website <http:///www.rluipa.org>.

[105] *See, e.g.*, Lakewood, Ohio, Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983)(upholding ordinance limiting churches to 10% of community); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983)(upholding city=s refusal to allow elderly and infirm Rabbi to hold religious services in converted garage, where property was in zone that prohibited houses of worship, but 50% of city was zoned to allow them); First Assembly Church of God v. City of Alexandria, 739 F.2d 942 (4th Cir. 1984)(requiring church to comply with fencing, shrubbery and enrollment restrictions); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988)(upholding ordinance barring construction of church in agricultural zone either as "of right" or by special permit); Christian Gospel Church, Inc. v. San Francisco, 896 F.2d 1221 (9th Cir. 1990)(upholding requirement that church obtain conditional use permit before converting dwelling in single-family residential district to church use);Love Church v. City of Evanston, 671 F.Supp. 515 (N.D. Ill. 1987)(upholding requirement that church obtain a special permit); Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F.Supp. 655 (S.D.N.Y. 1984)(upholding enforcement of local occupancy and fire safety regulations). *C.f.*, Cornerstone Bible Church v. City of Hastings, Minn., 740 F.Supp. 654 (D.Minn. 1990), *aff'd in part, rev'd in part and remanded*, 948 F.2d 464 (8th Cir. 1991)(remanding case to trial court to determine if city has factual support for its claim that ordinance permitting churches in most residential areas and prohibiting churches in commercial and industrial areas advanced its goal of revitalizing the business district).

[106] *See, e.g.*, International Church of the Foursquare Gospel v. City of Chicago Heights, 955 F.Supp. 878 (N.D.Ill.E.D. 1996)(holding that church failed to show likelihood of success on RFRA claim challenging city=s denial of special permit); Germantown Seventh Day Adventist Church v. Philadelphia, 1994 WL 470191 (E.D. Pa.), *aff=d* 54 F.3d 768 (3d Cir. 1995)(denying claim that RFRA barred the application of parking requirements to religious institutions); Church

of Iron Oak v. Palm Bay, 868 F.Supp. 1361 (M.D. Fla. 1994), *aff=d*, 110 F.3d 797 (TABLE)(11th Cir. 1997)(denying preliminary injunction to plaintiffs claiming RFRA barred special permit for church in a residential district); *see also* Osborne v. Power, 890 S.W.2d 570 (Ark. 1994)(holding that RFRA does not apply to uses that constitute a nuisance, in this instance a massive display of Christmas lights that created traffic jams and other problems in a residential neighborhood) *and* Keeler v. Cumberland, *Keeler I*, 928 F.Supp. 591 (D.Md. 1996)(declaring RFRA unconstitutional violation of federal separation of powers).

[107] S*ee* Stuart Circle Parish v. Bd. of Zoning Appeals of the City of Richmond, 946 F.Supp. 1225 (E.D. Va. 1996); Western Presbyterian Church v. District of Columbia, 862 F.Supp. 538 (D.D.C. 1994); Jesus Center v. Farmington Hills Zoning Bd. Of Appeals, 215 Mich.App. 54, 544 N.W.2d 698 (1996).

[108] 940 F.Supp. 879 (D.Md. 1996).

[109] Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F.Supp. 1554, 1560 (M.D. Fl. 1995), noting that "the City's interest in regulating homeless shelters and food banks is a compelling interest and that [the zoning] code furthers that interest in the least restrictive means,"

[110] *See,* Mary J. Dwyer, Note *Oops! You Missed a Step: The Court Stumbles on the Substantial-Burden Threshold in Jesus Center v. Farmington Hills Zoning Bd. Of Appeals,* 14 COOLEY L. REV. 121 (1997).

[111] See Carol M. Kaplan, Note, *The Devil Is In the Details: Neutral, Generally Applicable Laws and the Exceptions from* Smith, 75 N.Y.U. L. Rev. 1045 (2000). The author notes: AWithout inquiring into whether there was any discriminatory enforcement of the landmark ordinance, the court simply deemed the exceptions in the landmark ordinance to constitute individualized exemptions, and placed the claim within the Sherbert exception. In holding that this case fell outside Smith, the court announced an extremely broad reading of the Sherbert exception: >[W]here the government enacts a system of exemptions, and thereby acknowledges that its interest in enforcement is not paramount, then the government Amay not refuse to extend that system [of exemptions] to cases of 'religious hardship' without compelling reason.@ > @ This interpretation of the Sherbert exception suggests that any kind of secular exemption in the text of a statute--whether it be applied through a highly discretionary or an entirely objective assessment--makes a religious exemption mandatory. Such a conclusion clearly flies in the face of the holding in Smith. If the holding in Keeler--that where the

government provides an exception to its landmark preservation laws for secular reasons, it must also extend exceptions for religious reasons--was correct, then the holding in Smith would surely have been that where government exempts from prohibition certain secular, medical uses of drugs, it is required to exempt religious uses as well. But Smith squarely rejected exactly that proposition. *Id*. at 1066- 68. Footnotes omitted.

[112] First Covenant Church v. City of Seattle, 120 Wash.2d 203, 840 P.2d 174 (1992); First United Methodist Church v. Hearing Examiner, 129 Wash.2d 238, 916 P.2d 374 (1996); Munns v. Martin, 131 Wash.2d 192, 930 P.2d 318 (1997).

[113] *See, e.g.*, Open Door Baptist Church v. Clark County, 140 Wash.2d 143, 995 P.2d 33 (2000)(holding that requiring church to apply for a conditional use permit was not an impermissible burden on free exercise of religion); First Baptist Church of Perrine v. Miami-Dade County, 768 So.2d 1114, 1118(Fla.App. 3 Dist. 2000)(holding that special permit requirement is neutral law that does not impose substantial burden on religion and noting that Aeven assuming that the Church has demonstrated a substantial burden on its free exercise of religion, the County clearly has a compelling interest in enacting and enforcing fair and reasonable zoning regulations.@); Korean Buddhist Dae Won Sa Temple v. Sullivan, 953 P.2d 1315 (Haw. 1998)(upholding height limitation applied to the plaintiff=s house of worship after finding that the regulation did not substantially burden the free exercise rights of the worshipers). *See also*, Warner v. City of Boca Raton, 64 F.Supp.2d 1272 (S.D. Fla. 1999)(holding that city=s prohibition of vertical grave markers in public cemetery did not implicate Florida Religious Freedom Restoration Act and did not violate First Amendment) *and* City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., -- N.E. 2d --, 2001 WL 290835 (Ill. 2001)(holding denial of special permit for church was arbitrary and unreasonable application of zoning ordinance and thus declining to address claim that denial also violated Illinois Religious Freedom Restoration Act).

[114] Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 44 (2000).

[115] *See, e.g.*, Article Two of the Massachusetts Constitution, which provides, in part: "[N]o subject shall be hurt, molested, or restrained in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship," *and* Article 1, section 11 of the Washington Constitution,

which provides that "[a]bsolute freedom of conscience in all matters of religious . . . worship . . . shall be guaranteed to every individual." *See generally*, G. Alan Tarr, Understanding State Constitutions, 65 Temp. L. Rev. 1169, 1170-79 (1992) (detailing the many differences between the state and federal constitutions).

[116]See: Ala. Const. amend. 622; Ariz. Rev. Stat. " 41-1493 to 41-1493.02 (Supp. 1999); Conn. Gen. Stat. Ann. ' 52-571b (West Supp. 2000); Fla. Stat. ch. 761.01-761.05 (2000); 2000 Idaho Sess. Laws 133-34; 775 Ill. Comp. Stat. Ann. 35/10, 35/15, 35/20, 35/25 (West 1998); 2000 N.M. Laws 17; Okla. Stat. Ann 51 " 251-258 (West Supp. 2000); R.I. Gen. Laws ' 42-80.1-3 (1998); S.C. Code Ann. " 1-32-10, 1-32-20, 1- 32-30, 1-32-40, 1-32-45, 1-32-50, 1-32-60 (Law. Co-op. Supp. 1999); Tex. Civ. Prac. & Rem. Code Ann. " 110.003-110.012 (Vernon Supp. 2000)(containing an exemption for land use regulation).

[117] *See, e.g.*, Cal. Govt. Code " 25373 & 37361, allowing for exemption from landmark designation for noncommercial property of religious organizations; Mass. Gen. Laws Chapter 40A, Sec. 3, prohibiting exclusion of religious uses of property from any zoning district

[118] *See, e.g*., Martin v. Corporation of the Presiding Bishop, 434 Mass. 141, 747 N.E.2d 131 (2001)(ruling that state=s ADover Amendment,@ restricting zoning concerning land or structures used for religious purposes, prohibited rigid application of zoning bylaw=s height limit to church steeple); City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001)(rejecting argument that the state constitution=s guarantees of religious protection should be equated with those of the First Amendment); East Bay Asian Local Development Corp. v. State of California, 102 Cal.Rptr.2d 280, 13 P.3d 1122 (2000)(upholding statute allowing for exemption from landmark designation for noncommercial property of religious organizations): First Covenant Church v. City of Seattle, 120 Wash.2d 203, 840 P.2d 174 (1992)(holding that landmark ordinance imposed impermissible financial burden on church); First United Methodist Church v. Hearing Examiner, 129 Wash.2d 238, 916 P.2d 374 (1996)(holding mere designation of a church as a landmark violated religious freedom because it might pose a barrier should the church seek to sell the property); Munns v. Martin, 131 Wash.2d 192, 930 P.2d 318 (1997)(holding that demolition permit ordinance, which had potential to cause a 14-month delay in plans to demolish a Catholic school building and construct a pastoral center, violated the free exercise of religion guaranteed in the state constitution); *but c.f*. Christian Academy of Abilene v. City of Abilene, 62 S.W.2d 217 (Tex. App. 2001)(ruling that

Texas Religious Freedom Act did not apply to city=s suit for injunction against private religious school where Act was enacted after cause of action accrued).

[119] *See, e.g,* High Street United Methodist Church v. City of Binghamton, 186 Misc.2d 159, 715 N.Y.S.2d 279 (N.Y. Sup. 2000).

[120] *See, e.g.*, Korean Buddhist Dae Won Sa Temple v. Sullivan, 953 P.2d 1315 (Haw. 1998)(upholding height limitation applied to the plaintiff=s house of worship after finding that the regulation did not substantially burden the free exercise rights of the worshipers); Grace Community Church v. Town of Bethel, 30 Conn. App. 765, 622 A.2d 591 (1993) (applying First Amendment analysis in upholding special permit requirement for churches); Bethel Lutheran Church v. Village of Morton, 201 Ill.App.3d 858, 147 Ill.Dec. 360, 559 N.E.2d 533 (Ill.App. 3 Dist. 1990)(using First Amendment analysis to uphold the imposition of an enrollment cap on a parochial school); Burlington Assembly of God Church v. Zoning Board, 238 N.J.Super. 634, 570 A.2d 495 (N.J.Super.L. 1989)(holding that denial of variance to construct a radio transmission tower on its property so the church could operate a radio station as part of its religious mission was an unconstitutional violation of the church's rights to the free exercise of religion and freedom of speech that could not be justified by the township's concerns about safety and possible interference with television, telephone and radio usage).

[121] *See, e.g.*, Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. City of Porterville, 90 Cal.App.2d 656, 203 P.2d 823, *appeal dismissed* 338 U.S. 805 (1949).

[122] *See, e.g.,* Jewish Reconstructionist Synagogue of North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 379 N.Y.2d 283, 342 N.E.2d 534 (1975), *cert. denied,* 426 U.S. 950 (1976); *but see* Cornell University v. Bagnardi, 68 N.Y.2d 583, 594, 503 N.E.2d 509, 514 (1986)(stating A[t]here is simply no conclusive presumption that any religious or educational use automatically outweighs its ill effects.@)..

[123] Chicago Municipal Code Sec. 21-69.1.

[124] *See, e.g.*, Society of Jesus v. Boston Landmarks Commission, 409 Mass. 38, 564 N.E.2d 571 (1990)(holding that designation of church interior violated state constitution=s guarantee of religious freedom).