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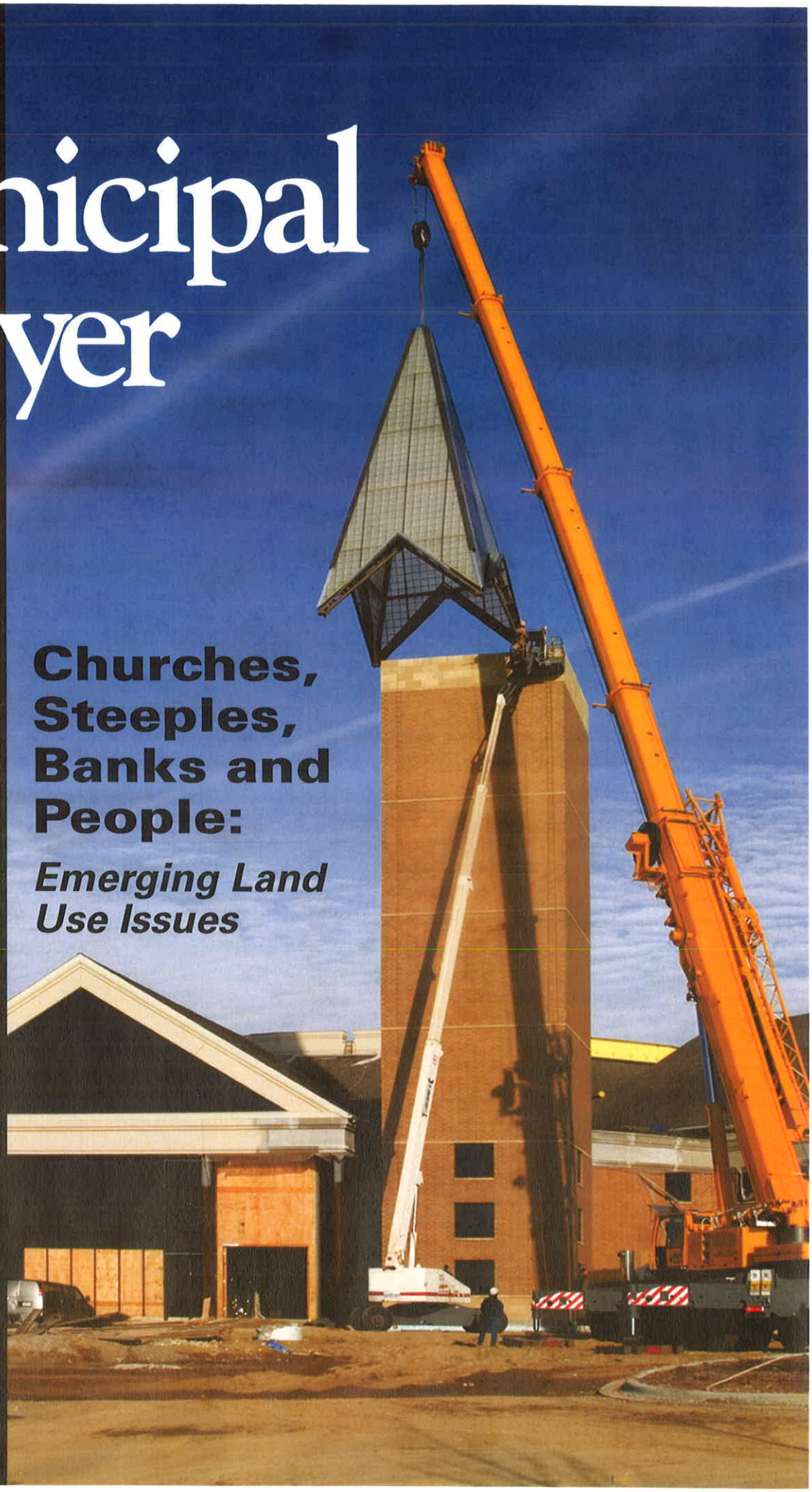

Churches, Steeples, Banks and People:

Emerging Land Use Issues

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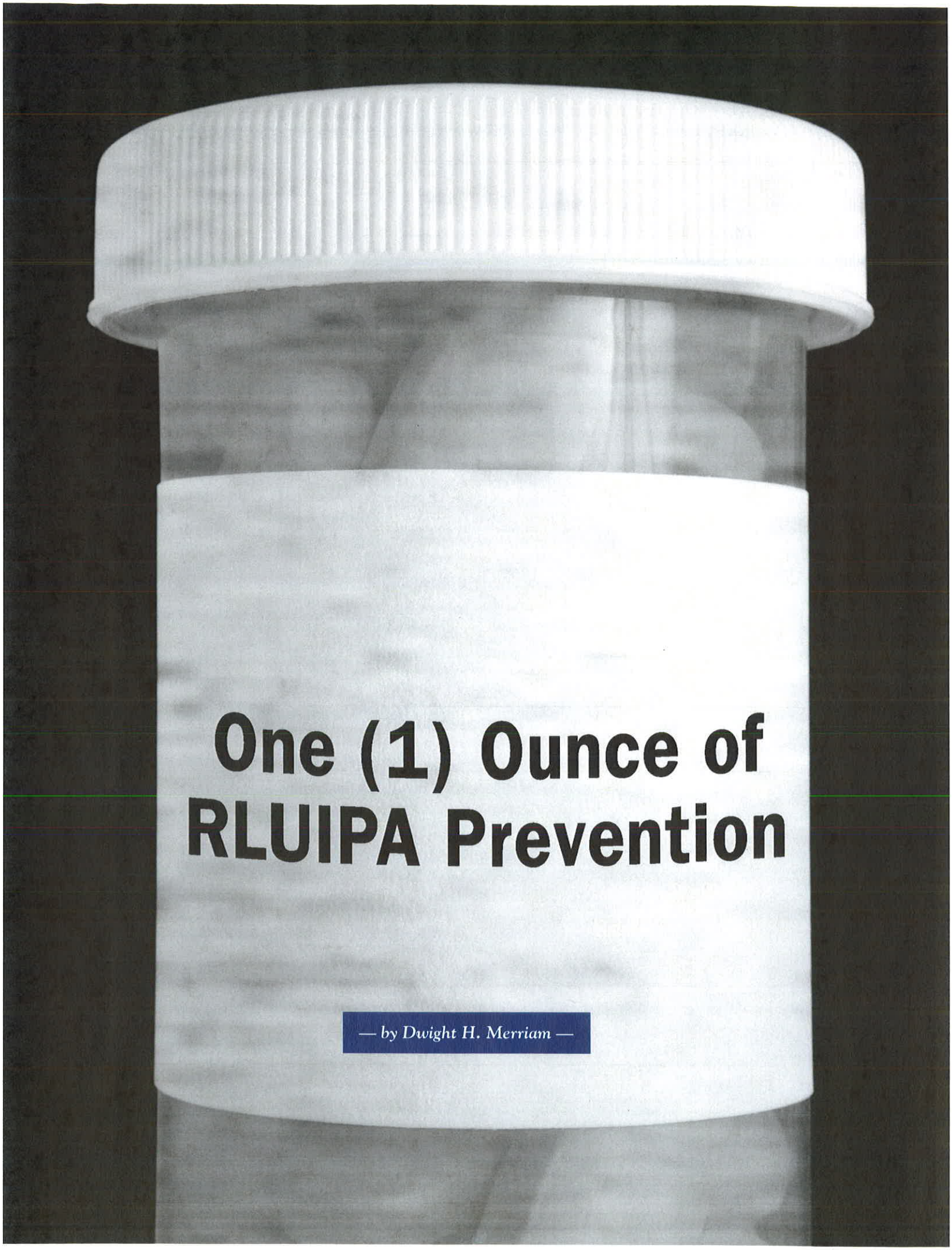

— by Dwight H. Merriam —

One problem with being a lawyer is thinking like one. A noted psychologist once offered: "When the only tool you have is a hammer, then every problem begins to look like a nail."[1] When local government lawyers gather to talk about the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[2] the conversation, after the preliminary grousing, usually devolves into legalspeak: motions to dismiss, motions for summary judgment, discovery, burden of proof, and so on. We need to take a step back with RLUIPA, shift out of the "lawyer litigation" mode, and become counselors of prevention at the earliest stages, long before the first night of the public hearing. Benjamin Franklin famously said: "An ounce of prevention is worth a pound of cure."[3] This aphorism makes sense with RLUIPA liability. Here are some ideas on how to avoid claims in the first instance and, if necessary, create a winning defense.

Plan for Religious Uses

Municipalities have learned to head off First Amendment adult entertainment claims by planning for and providing opportunities for these bothersome uses. The literature on how to do it right is voluminous.[4] But few localities have an active program to identify definitive areas for religious uses. There is virtually no literature on planning for religious uses as a way to meet constitutional and statutory mandates prohibiting governments from imposing a substantial burden on the exercise of religion. The case law, including two recent significant rulings, *Westchester Day School v. Village of Mamaroneck*,[5] and *Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission of the Town of Newtown*,[6] make it clear that the courts want to see substantial evidence in support of a decision denying a religious use. That evidence, in most cases, must arise from good planning.

To plan for religious uses, start by inventorying present religious uses. Determine current and future needs. Interview religious leaders concerning their plans, including ancillary uses—education, senior day-care, afterschool recreational programs, affordable housing, and alcohol and drug rehabilitation. Will local campuses suffice, or do they aspire to larger facilities that will draw membership from a broader geographic area? Will the use of electronic media reduce the need for public assembly space or change the peak times of use? Are they planning multiple services, or services on more days, to handle increases in attendance? Don't worry whether these activities are within the reach of RLUIPA.[7]

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Regulate for a Broad Class

The concerns of land use regulators about the impacts of religious uses are the same as they are for other kinds of public assembly uses—size, harmony with the neighborhood, impact on property values, traffic, lighting, hours of operation, and management of events. In both the *Westchester Day School* and *Cambodian Buddhist Society* cases, the courts noted that the local regulations grouped religious uses with other places of public assembly. In Mamaroneck, private schools were allowed by special exception in the residential district where the school was located. So too were "parochial and private elementary and high schools which meet the same site standards of the State Education Department as a public school... nursery schools...[and] non-profit membership clubs."[8] In Newtown, the regulations allowed many nonresidential uses in the farm-residential district, like: "clubs, ... places of religious worship, private schools and seasonal camps..., [and] hospitals."[9]

By regulating generically, you gain two advantages. First, a religious institution may recognize the fair treatment and be more open to a constructive dialogue with other stakeholders. Second, you could convince the court, should the RLUIPA hammer be dropped on you, that there was no "individualized assessment" and, therefore, that the court need never reach the issue of whether there was a "substantial burden." A Tenth Circuit case, where local officials successfully defended the denial of a planned addition of a day-care center in a residential neighborhood, is one important example of this.[10] Also, the court in *Cambodian Buddhist Society*, in finding no "individualized assessment," held that the Newtown regulations did "not grant the commission the discretion to apply standards differently to religious facilities than it applie[d] them to other uses allowed by special exception."[11]

If you deviate from the gold standard of treating all places of public assembly the same, give any largesse to religious uses. As the court in *Cambodian Buddhist Society* noted with approval: "the provisions of the town's regulations allowing religious facilities to be built in a residential zone by special exception treat such uses more, not less, favorably than certain other nonresidential uses that are not allowed by special exception."[12]

The Town of Plainfield, Indiana, has a Religious Use District specifically for

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such uses.[13] This is an unusual approach and seems to require an individualized assessment under the master site plan provision. As such, the approach may impose unnecessary risk; the better approach may be that of Abington Township, Pennsylvania, which recognizes the similarities in use, intensity and impact, and created public institutional districts, including hospitals, schools, and religious facilities.[14] Of course, you know you shouldn't risk giving preference to some types of religious uses over other types because of the potential for being skewered by that other provision in the First Amendment—the Establishment Clause—which prohibits government from promoting religion, or favoring one religion over another.[15] Regardless of your approach, never restrict religious activities more than nonreligious activities of the same type. This is much like the doctrine in sign regulation that you can never treat commercial signs more favorably than those with pure speech.[16]

Plan and Regulate for Other Uses

Avoiding RLUIPA claims does not mean that local governments must let religious uses trump everything else. Exclusive residential areas, single-purpose industrial zones, and protected agricultural areas are typical of zoning classifications that may exclude religious activities entirely in those areas, so long as—isn't there often a "so long as" in the law?—you provide ample opportunities for the religious uses in appropriate locations elsewhere. Borrowing from the jurisprudence of adult entertainment zoning, we should assume that "ample" means the allocation of some surplus of land area to overcome imperfect markets.[17] Not all sites are acceptable (too big, too small, poor location or unacceptable environmental impacts) and some may not be on the market at all.

You may integrate religious uses with other uses to create a positive effect. Do you want a walkable community? If so, do you have a plan for concentrating places of public assembly, secular as well as religious? Or do you have a widely-supported policy to protect the residential character of your neighborhoods and, therefore, ban all public assembly uses in those areas while providing ample alternatives elsewhere?

Focus on Heavyweight Objectives

Government can impose a substantial burden on religious exercise if there is a compelling need to do so. No court has yet held that aesthetics, including historic preservation and design standards, are a compelling governmental objective.[18] Focus regulation and decision-making on heavyweight objectives; chiefly, health and safety. If a certain type, intensity, or location of development—religious use or otherwise—will create a health and safety issue, it can be denied and that decision successfully defended, provided it is supported by substantial evidence and not pretextual. A good regulation may further other public objectives, such as aesthetics and tourism, but including them may dilute the health and safety basis for the regulation.[19]

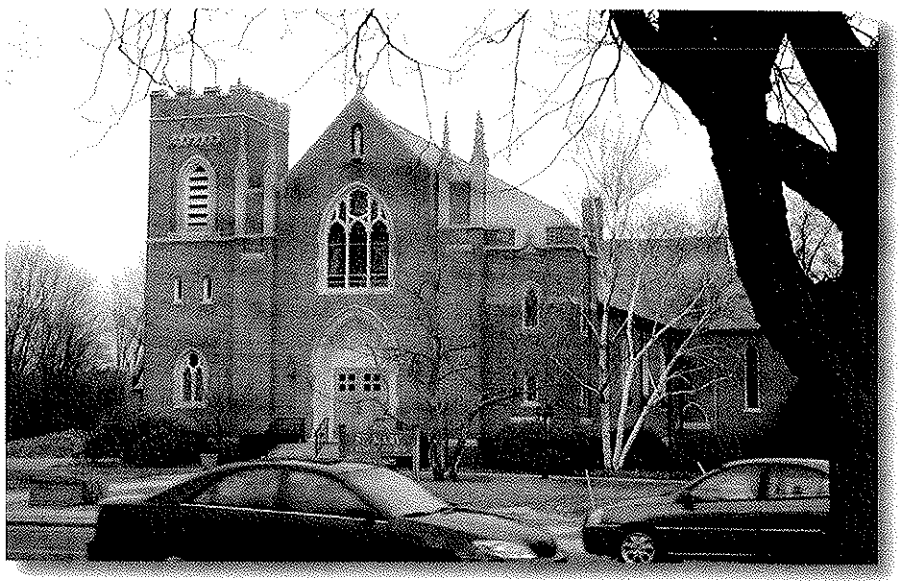
Be Your Own Critic

Take a hard look at your planning and decision-making procedures for religious and other assembly uses, and the substance of your regulations. You can do it yourself, but sometimes, it is better to hire an outsider, who may see the problems locals often miss because they are too close to the issue, and who may be more comfortable in offering candid criticism. Does the plan evidence sufficient study and analysis of the need for religious space? Are there adequate and appropriate areas zoned for these uses? Are religious uses treated the same as any other places of public assembly? Does the record of decision-making demonstrate a pattern of having substantial evidence, and are decisions based on the record? No doubt you can add many more inquiries to your audit. The objective of the audit is to expose problems and correct them, long before staff and public officials are faced with a religious land use controversy.

Prepare the Points of First Contact

The first point of contact for a religious organization seeking approval of a land use is the front desk of the planning and zoning office. The clerks, the zoning enforcement officers, and the planners are all motivated to serve the public interest by being helpful and responsive to inquiries, but the potential exists for them to give incomplete, inadequate, or inaccurate information.

What should you do? Spend some time with the staff to brief them on



To plan for religious uses, start by inventorying present religious uses. Photo by Alexander H. Merriam.

The objective of the audit is to expose problems and correct them, long before staff and public officials are faced with a religious land use controversy.

their obligations in responding to inquiries and about the potential for claims, based on the representations of municipal staff with actual or apparent authority. You could have the staff prepare a guidebook on local public planning and zoning resources which gently includes a warning that the staff do not give legal advice, and that potential applicants should seek their own professional and legal advice when interpreting the regulations and their applicability. Remember, also, to send staff and public officials updates on developments in the law.

You might enable, encourage, or even mandate pre-application reviews so that potential applicants come before the decision-making bodies early in the process. Local government lawyers are often at these meetings—even if they are not, local boards often have the experience necessary to manage the communications process. Absolutely essential to minimizing local government liability under RLUIPA is to prevent the glib, joking (often unfunny), and blatantly prejudicial comments. Even statements by the public can be imputed to a municipality, though only the government is liable under RLUIPA and the Constitution.[20] For example, in finding for a religious organization providing recovery assistance to substance-addicted individuals, a federal district court judge noted evidence of discriminatory intent:

> Here, there were three public hearings, so the record is replete with evidence of the views of the people who the ...[public boards]... serve and represent. Moreover, not only did the public express strong negative views on the matter, but there is record evidence that the decisionmakers and advisers to those decisionmakers subscribe to those views, and relied upon them in their decision-making.[21]

When anyone says something that is obviously inappropriate and inconsistent with the municipality's public policy, the most important "damage control" by the chairperson is to immediately disavow and repudiate the statement, on the record, as contrary to local public policy. Also useful might be a prepared statement, read at the beginning of every hearing, about what is and is not appropriate, with emphasis on the unacceptability of animus on the basis of race, gender, religion and the like. Finally, the cumulative impacts of several actions can create an appearance of discrimination. *Guru Nanak Sikh Society of Yuba City v. County of Sutter*[22] is one example; another is a lesser-known case where the complaint alleged animosity over a year-long zoning process: "[f]irst, the Township arbitrarily decided that the Society is not a church. Then it refused to accept a supplemental application. Then it changed its laws to gerrymander the Society out of Georgetown Township. And all along the way, the Township has exhibited hostility towards the Society."[23] The township lost the case, and, as it had put nothing on the record concerning any compelling interest, that backstop was unavailable.

Making pre-application meetings available as a regular and expected part of the process will also help potential applicants to shape their projects in ways that increase the chances of getting approval upon the first application, and avoid later controversy after much time, effort, and expense has been devoted to detailed plans. It is at this stage that any developer has the greatest ability to alter its plans.

Electronically Stored Information

The Federal Rules of Civil Procedure now address the discovery of "electronically stored information,"[24] or ESI. This includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained," and parties in federal litigation may "inspect, copy, test, or sample any designated documents or electronically stored information."[25] The sheer volume of ESI—quite apart from the sometimes damaging content found within—has created an almost incalculable burden on litigants because of the cost of producing ESI.

A formal records retention policy and organized electronic document storage and retrieval system will protect a government from unnecessary liability. First, get all local government computer systems on a single server, with adequate backup, so that records can be more easily retrieved. Second, establish governmental e-mail accounts for all public officials and staff, and prohibit officials and staff from using their personal e-mail accounts for government communications.

You Can Use Discretionary Zoning

With the ruling in *Cambodian Buddhist Society*, it has become clearer that local governments can use a discretionary special permit, special use permit, special exception or a conditional use—all terms for the same site-specific, use-driven administrative review. Previously, there was concern that such discretionary reviews were bound to be interpreted as "individualized assessments" that opened the door to the "substantial burden" analysis.[26] The safest route appeared to be to make religious uses "as of right" uses. However, the court in *Cambodian Buddhist Society* held that RLUIPA did not even apply when the land use agency denied a special permit for a meditation temple and meeting hall in a residential zone. Why? First, it found that "the substantial burden provision of RLUIPA does not apply to neutral and generally applicable land use regulations that are intended to protect the public health and safety, such as those at issue in the present case."[27] The court also concluded that, while the regulations gave the agency some discretion, they did not permit the agency to apply them to religious facilities differently than to other special exception

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uses (e.g., clubs, hospitals, landfills and private schools). Therefore, the special exception regulations did not allow for an "individualized assessment" and, consequently, the substantial burden analysis was unnecessary.[28] Importantly, the land use agency had the discretion in the regulations to apply them in a discriminatory manner, but it did not.[29] It was not the regulations themselves, or the procedural nature of the discretionary special exception authority, but the decision made by the agency ("motivated not by religious bigotry but by neutral considerations"[30]) that defined whether it was an individualized assessment. How many other courts will follow this reasoning is uncertain, but you can be sure that local governments will cite this decision every chance they get.

Develop a Winning Record

Nothing is more important in successfully defending against a RLUIPA claim than a complete, comprehensive, and convincing record of rational decision-making based on the pursuit of legitimate governmental objectives. If the RLUIPA claimant gets past the "substantial burden" hurdle, the municipality must assert and prove "compelling" interests for its action, and that its decision was the least restrictive means possible for this religious applicant. The *Westchester Day School* and *Cambodian Buddhist Society* decisions are polar opposites in this respect. In the former, the court held for the Jewish day school because it found that there was no substantial evidence;[31] in the latter, the substantial evidence in support of the denial won the day for the town.[32] Together, these decisions can guide you to your chosen destination.

"A Little Neglect May Breed Great Mischief"

"For want of a nail the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost," noted Benjamin Franklin.[33] Local government lawyers, by refocusing and giving a little more attention to local planning, regulation and decision-making long before the religious use application comes in, can save themselves a pound of cure.

Municipal Lawyer

Coming in the July/August 2008 issue of the *Municipal Lawyer*! Our annual review of litigation and liability issues will include articles on the Admissibility of Police Practices Expert Testimony; Regulating Election Signs; and *Gianetti v. City of Stillwater:* A Case Study on Defending Section 1983 "Positional Asphyxia" Claims.

(*Author's Note:* The author wishes to thank Susan Merriam, Marci Hamilton and Charles Janson for their helpful comments on drafts of this article, and Alexander H. Merriam for contributing the photograph.)

Notes

1. Attributed to Abraham H. Maslow (1908-1970), American psychologist and one of the founders of humanistic psychology.
2. 42 U.S.C. § 2000cc *et seq.* (West 2008).
3. THE NEW DICTIONARY OF CULTURAL LITERACY (3d ed. 2002).
4. *See, e.g., Adult Use Impact Studies and Regulations*, Planning Advisory Service (PAS) (January 2007) and the publications listed therein; available at http://www.planning.org/pas/pdf/infopackadultuse.pdf.
5. 504 F. 3d 338 (2d Cir. 2007).
6. 941 A.2d 868 (Conn. 2008).
7. For a discussion of evaluating accessory uses, see Shelley Ross Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 UTAH L. REV. ___, available on SSRN at http://ssrn.com/abstract=1090654.
8. MAMARONECK, N.Y. CODE, Chap. 240, §§ 240-21B (2004).
9. NEWTOWN, CONN., ZONING REGULATIONS, § 4.06.100 (2008).
10. Grace United Methodist Church v. City of Cheyenne, 451 F. 3d 643 (10th Cir. 2006).
11. 941 A.2d 868, 893 (Conn. 2008).
12. *Id.*
13. PLAINFIELD, IND. ORDINANCES NOS. 51-2005, 27-2007, art. 3.4, Religious Use District (2007), available at http://townofplainfield.com/main/docs/ordinances/200801171443340.Article%2003-04%20REL.pdf.
14. ABINGTON TOWNSHIP, PENN. ORDINANCE NO. 1753 (May 9, 1996). For a discussion, see *Congregation Kol Ami v. Abington Twp.*, 309 F. 3d 120 (3d Cir. 2002); *Congregation Kol Ami v. Abington Twp.*, 2004 U.S. Dist. LEXIS 16397 (E.D. Pa., Aug. 12, 2004).
15. The Free Exercise Clause also prohibits favoritism; *see* Brown v. Borough of Mahaffey, 35 F. 3d 846 (3d Cir. 1994).
16. *See generally*, Nasar Jewelers, Inc. v. City of Concord, 513 F. 3d 27 (1st Cir. 2008); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).
17. Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).
18. *See, e.g.*, Whitton v. City of Gladstone, 54 F. 3d 1400, 1408 (8th Cir. 1995).
19. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Justice Kennedy stated, in his concurring opinion, that the "promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate." *Id.* at 1035.
20. Open Homes Fellowship, Inc. v. Orange County, 325 F. Supp. 2d 1349 (M.D. Fla. 2004).
21 *Id.* at 1359 n.20.
22. Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F. 3d 978 (9th Cir. 2006).
23. The Beckett Fund for Religious Liberty, *Lawsuit filed against Michigan town that ruled a church is not a church*, (Apr. 1, 2003) available at http://www.becketfund.org/index.php/article/92.html; *see also*, Great Lakes Society v. Georgetown Charter Township, et al., Ottawa County Circuit Court, Case No. 03-4599-AA) (July 20, 2007) available at http://www.becketfund.org/files/316a8.pdf.
24. FED. R. C IV. P. 34(a).
25. FED. R. C IV. P. 34 (a)(1)(A).
26. *See, e.g.*, Saints Constantine and Helen Greek Orthodox Church, Inc. v. v. City of New Berlin, 396 F. 3d 895 (7th Cir. 2005).
27. 941 A.2d 868, 882 (Conn. 2008).
28. *Id.* at 892-93.
29. *Id.* at 907.
30. *Id.*at 893.
31. 504 F. 3d 338, 351-52 (2d Cir. 2007).
32. 941 A.2d at 874.
33. Although the maxim was cited by Benjamin Franklin, the source appears to be a nursery rhyme. One source indicates the earliest known written version of the rhyme is in John Gower's *Confesio Amantis*, dated approximately 1390. **ML**

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