



A \$6.5 Million Lesson in RLUIPA Defense

by Evan Seeman

Evan J. Seeman is a lawyer in Robinson & Cole's Hartford office, where he represents municipalities, developers, and landowners in land use matters. He is a co-author of the blog RLUIPA-Defense (www.rluipa-defense.com), with Dwight H. Merriam. He is currently representing a Connecticut soup kitchen in RLUIPA litigation.

The Town of Greenburgh, New York has agreed to pay Fortress Bible Church \$6.5 million to settle claims that the Town violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) by denying the Church's application to construct a house of worship and religious school, making it the largest settlement in RLUIPA's history. Reportedly, the Town's insurance will cover only \$1 million, with Town's citizens having to fund the balance, paying \$1.1 million per year in principal, plus interest over a five-year period beginning in 2015. The settlement comes on the heels of the Second Circuit's 2012 decision in the case, *Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012), finding that the Town violated RLUIPA in denying the Church's proposal. The fifteen-year saga in *Fortress Bible*, beginning in 1998 and culminating in the record-setting settlement, may serve as an RLUIPA primer for municipalities reviewing applications for zoning approval from religious institutions.

Background

The Town's actions in considering the Church's application reads like a list of what not to do when reviewing an application from a religious institution. When the Church submitted its application to the Town's Board in 1998, Town officials expressed their concern about the Church's tax-exempt status and requested that the Church donate a fire truck or make some other payment to the Town to alleviate the concern. After the Church refused, the Board required the Church to undergo New York's State Environmental Quality Review Act (SEQRA) based on its findings that there was the potential for significant environmental impact, even though the Town's planning commissioner found no impact would be caused by the proposal.

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The Town promptly fired the planning commissioner, presumably for expressing this opinion.

Over the next several years, the Church provided all of the information required of it under the SEQRA process, but the Town continued to act in bad faith. In 2001, the Town in-

Agency members should immediately and publicly renounce on the record any comments that can arguably be construed as discriminatory, and should be clear that religion plays no part in their review of the application.

formed the Church that to move forward with the SEQRA review process, it would have to make yearly financial contributions to the fire department. The Church refused and members of the Board instructed the Town's new planning director to "kill" the project. Other members of the Board stated that they were opposed to the proposal because it was "another church." The Town continued to request new information and raise new issues under SEQRA for the Church to address. In 2002, the

Town stopped the review process altogether because it wanted the Church to reimburse it for certain fees that the Town incurred during the process. In 2004, the Town denied the Church's application and manipulated its SEQRA findings statements to "kill" the proposal due to zoning concerns, even though there were no serious environmental impacts.

The Church sued and, after a twenty-six day trial, the United States District Court for the Southern District of New York found that the Town substantially burdened the Church's religious exercise in violation of RLUIPA by forcing it to continue to exercise its religion from a facility incapable of accommodating all of its religious practices. It also found violations of the Fourteenth Amendment's Equal Protection Clause and state law. The Second Circuit affirmed. The decision is noteworthy for its finding that certain environmental review processes, such as SEQRA, may implicate RLUIPA. Generally, RLUIPA applies to a "land use regulation," defined in part by the statute as a "zoning or landmarking law." 42 U.S.C. § 2000cc-5(5). Because environmental laws, like SEQRA, are not encompassed within this definition of a "land use regulation," it was thought that they did not invoke RLUIPA. As illustrated by the Town's actions, however, municipalities that manipulate environmental review procedures to deny zoning applications are not insulated from the strictures of RLUIPA.

Editor

Jennie Nolon Blanchard, Esq., MEM, LEED AP
*Senior Staff Attorney &
Urban Program Specialist,
Land Use Law Center, Pace Law School*

Student Editorial Board

Steven E. Gavin
*Managing Editor
Student, Pace Law School*

Roisin Grzegorzewski
*Acquisitions Editor & Staff Writer
Student, Pace Law School*

Allison Sloto
*Copy Production & Features Editor
Student, Pace Law School*

Contributors

Elizabeth L. Carter
Student, Rutgers University

Gregory W. Lavigne, Jr., Esq.
Attorney, Frost Brown Todd LLC

Timothy G. Mara, Esq., AICP
Attorney

Sameer Ponshe
Student, Pace University

Carrie Richter, Esq.
Attorney, Garvey Schubert Barer

Evan J. Seeman, Esq.
Attorney, Robinson & Cole LLP

David Silverman, Esq., AICP
*Co-Chair of the Zoning & Land Use Group
Ancel, Glink, Diamond, Bush, DiCianni &
Krafthefer, P.C.*

Adam Simon, Esq.
*Attorney, Ancel, Glink, Diamond, Bush,
DiCianni & Krafthefer, P.C.*

Edward J. Sullivan, Esq.
Attorney, Garvey Schubert Barer

Beau F. Zoeller, Esq.
Attorney, Frost Brown Todd LLC

The lessons to be learned from *Fortress Bible*, highlighted below, may prove a useful tool for municipalities reviewing applications from religious institutions.

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LEED AP
JNolon2@law.pace.edu

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DSilverman@ancelglink.com

Technology & Social Media
Meg Byerly Williams, Esq., MEM, MS
Meg@byerlywilliams.com

Early Career Program
Brett Peanasky
Brett.Peanasky@law.upenn.edu

Smith-Babcock-Williams Student Writing Competition
Alan C. Weinstein, Esq.
Alan.Weinstein@law.csuohio.edu

APA Amicus Committee
Patricia E. Salkin, Esq.
PSalkin@tourolaw.edu

Daniel J. Curtin, Jr. Fellow

Brett Peanasky
Brett.Peanasky@law.upenn.edu

Newsletter Editor

Jennie Nolon Blanchard, Esq., MEM,
LEED AP
JNolon2@law.pace.edu

Website Editor

Meg Byerly Williams, Esq., MEM, MS
Meg@byerlywilliams.com

CM Administrator

David Silverman, Esq., AICP
DSilverman@ancelglink.com

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Watch What You Say

Land use agency members should always be aware that what they say in public session might be used in litigation. This is especially true when reviewing applications from religious institutions. Discriminatory comments made by such members may support a court's finding of an RLUIPA violation. Even seemingly innocent comments or

Municipalities may be well advised to hold religious institutions to the same process, under the same review procedures, as they would any other applicant.

comments made in jest can be just as harmful. In *Fortress Bible*, Board members publicly commented that they were opposed to the Church's proposal because they did not want "another church." Even if this comment was meant as a joke (and there is no indication that it was), it is important to remember that words may appear very different on paper than they sound when spoken. Lawyers can and will construe these comments as examples of overt discrimination.

There are some steps that can be taken to quell the damage.

Agency members should immediately and publicly renounce on the record any comments that can arguably be construed as discriminatory, and should be clear that religion plays no part in their review of the application. Canvassing each member to affirm the same on the record may also help. The same should apply when members of the public make discriminatory comments, lest the agency members will be found complicit in, or worse, persuaded by such comments. Finally, the agency may request that the offending member recuse him-or-herself from further review of the application, apologize to the applicant, and again, affirm on the record that religion plays no part in its review.

If Denying, Leave Open The Possibility For Reapplication

RLUIPA's substantial burden provisions prohibits a municipality from substantially burdening religious exercise unless it has a compelling interest in so doing and does so by the least restrictive means possible. 42 U.S.C. § 2000cc(a)(1). As stated in *Fortress Bible*, "[a] denial of a religious institution's building application is likely not a substantial burden if it leaves open the possibility of modification and re-submission." *Fortress Bible*, 694 F.3d at 219.

However, if a municipality is disingenuous in leaving open the possibility of modification and resubmission, a municipality may not be protected from a substantial burden claim. *Id.* The Second Circuit concluded the Town's stated willingness to consider a

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future application was not genuine because of “ample evidence that the Town wanted to derail the Church’s project after it refused to accede to its demand for payment in lieu of taxes, and that it had manipulated the SEQRA process to that end.” *Id.* Thus, to better defend against a substantial burden claim, a municipality may wish to express a willingness to receive a modified application for a similar proposal.

The Same Process Under The Same Procedures

RLUIPA requires that municipalities treat religious uses equally as compared to secular uses. 42 U.S.C. Section 2000cc(b)(1). Imposing a different, more onerous application process on a religious institution than a secular institution may support a violation of this equal terms provision. In *Fortress Bible*, for example, the Town continued to require that the Church provide additional information on new issues under SEQRA, and it tried to force the Church to donate a fire truck or make a financial contribution in order to move the SEQRA process along. Unless the Town

required the same of secular institutions, these actions may have resulted in the unequal treatment of the Church as compared to secular institutions. Municipalities may be well advised to hold religious institutions to the same process, under the same review procedures, as they would any other applicant.



Do Not Be Blinded By Politics

Unfortunately, for many municipalities, it all comes down to politics and perception. As RLUIPA litigation ensues, public officials may be less inclined to compromise or show any signs of weakness for fear that they will be perceived as caving to pressure and lose potential votes. While,

in many cases, RLUIPA violations may not result in significant monetary damages, if any at all, municipalities may be on the hook for attorneys’ fees, which could easily amount to hundreds of thousands of dollars, if not more. The longer litigation continues, the greater the risk for municipalities in this regard. And, if public officials are blinded by politics, they darn well better have enough insurance to cover their expenses, instead of leaving their citizens with a \$5 million bill in a \$6 million settlement, à la the Town of Greenburgh. ♦

Announcement of New Student Editorial Board Members



Allison Sloto joins the *Planning & Law Newsletter* as our Copy Production & Features Editor. Allison is currently a second-year student at Pace University School of Law, where she is a research assistant to Professor John R. Nolon of the Land Use Law Center. She graduated *cum laude* from the Commonwealth Honors

College of the University of Massachusetts Amherst in 2012 with dual degrees in Environmental Science (B.S.) and Political Science (B.A.), a minor in Mandarin Chinese, and certificates in International Relations and Public Policy and Administration. She expects to graduate in 2016 with a J.D. and Certificate of Environmental Law from Pace, as well as an M.E.M. from the Yale School of Forestry & Environmental Studies.



Roisin Grzegorzewski joins the *Planning & Law Newsletter* as our Acquisitions Editor and our Staff Writer. Roisin graduated from Fordham University in 2010 with a Bachelor of Arts degree in Urban and Environmental Studies. She is currently a second-year student focusing on environmental and land use law at Pace

Law School. Roisin is an Associate on Pace Environmental Law Review and is the secretary of the Land Use and Sustainable Development Law Society. She has worked on various land use projects during her time at the Land Use Law Center. Roisin is expected to graduate from Pace Law School in 2015 with a J.D. and a Certificate in Environmental Law.

Sharing Law and Intentional Communities: A Planning Solution for Urban Poverty

by Elizabeth L. Carter

Elizabeth Carter is currently a dual degree law and urban planning graduate student at Rutgers University where she is concentrating in the areas of housing and community development. Elizabeth plans to practice public interest law in the New York/New Jersey area with a specific focus on community transactional law, affordable housing development, co-operative initiatives, nonprofit law, and a newfound interest in intentional communities.

Sharing law, or community transactional law, is a body of law that promotes sharing and cooperation within local communities in order to advance a more affordable and sustainable way of life. Lawyers across the nation are working closely with local communities to facilitate various transactions that encourage communal ownership, local production, and active participation on behalf of community members to make social and economic change. Such transactions include barter (exchange of goods), time-share or time-banks (exchange of services), mutual or community credit (where notes are exchanged when money, goods or services in a community are limited), and the formation of intentional communities. These lawyers help facilitate such unconventional transactions by applying them to traditional le-

gal mechanisms. For instance, the formation of cooperative housing is a type of sharing and cooperative transaction that is common in New York City; so much so that there is a sophisticated body of law that supports this form of communal housing as well as various legal organizations that facilitate the same. In addition, there is federal law that regulates the communal (online) transaction of crowd-funding within the Securities Exchange Act of 1933. Likewise, there is a body of law in the District of Columbia (D.C.) that gives lawyers the tools to facilitate the production of urban gardening for community groups interested in engaging in this communal activity. Furthermore, the communal transactions of barter and time-share will have federal tax implications that are best suited for an attorney to facilitate. The above communal transactions are designed to strengthen and sus-

tain communities by making them self-sufficient, namely through cooperation and the sharing of local resources. With that being said, such transactions are essential for low-income communities where nonprofits prove to be insufficient and where the political process has done a disservice by regulating this disadvantaged group to the margins of mainstream resources.

Communal Transactions: A Solution for Urban Poverty

Marginalized communities across the nation are undergoing communal transactions as a means to becoming self-sufficient in the midst of failing urban economies. These transactions include urban gardening in localities such as Detroit, MI where community members are cultivating the abundance of unused land in order to address the community's food desert,



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which is a result of disinvestment by major food chains in Detroit. Although proven to be effective, these communal transactions are not the “go-to” urban planning response to urban decay. Instead, there is a heavy reliance on external community development financial institutions (CDFI) and community development corporations (CDC) to build community capital through the connection to mainstream resources. These CDFIs and CDCs, albeit helpful in many ways, also have the potential to be harmful, or even useless in other ways. For instance, due to their heavy emphasis on connecting low-income communities to the mainstream economy, many CDFIs and CDCs fail to realize the importance of a local economy for building community and self-sufficiency amongst the low-income population. This emphasis on low-income-mainstream connection is especially harmful for marginalized communities where such connections depend on a political process that often favors majority interests over low-income, minority interests. In addition, the heavy emphasis on building capital by CDFIs and CDCs ignores the valuable and often readily available nonmonetary exchanges of goods and services within low-income communities. Such nonmonetary exchanges are useful for building community and self-sufficiency where capital is lacking. For instance, a community member can exchange food grown in a

Marginalized communities across the nation are undergoing communal transactions as a means to becoming self-sufficient in the midst of failing urban economies.

community garden for a baby-sitting service performed by another community member. Finally, a low-income community can utilize a community credit system where a community member exchanges goods or services for notes recognized by the community as exchange alternatives when another community member lacks a desired good or service. Therefore, CDFIs and CDCs should support the communal efforts of its constituents and planning lawyers assisting these institutions or working directly with community members should move towards a sharing law solution to urban poverty, where building communities goes beyond building capital.

Supporting Communal Transactions: Becoming *Sharing Lawyers*

Planning lawyers, with their keen knowledge of urban issues, can be useful for facilitating sharing and cooperative transactions within low-income communities. For instance, a planning lawyer can help a low-income community become an intentional community where people commit to a lifestyle of barter, time-share, and community credit in order to supplement their limited capital (as described above). An intentional community requires its mem-

bers to have a commitment and a purposeful direction towards self-sufficiency. However, it can become difficult for people to stay committed to this type of alternative lifestyle. Thus, a planning lawyer who is both knowledgeable and passionate about urban issues is best to mediate any disputes among the group and to support the group’s vision of self-sufficiency. An effective way to do this is for the planning lawyer to also commit to a sharing lifestyle where the planning lawyer becomes a sharing lawyer. In addition to urban law, sharing lawyers must have knowledge in various areas of the law, including tax law, securities law, housing law, and employment law. Furthermore, sharing lawyers must engage in policy advocacy in order to help sophisticate the laws surrounding these unconventional communal transactions. Lastly, sharing lawyers need to be flexible and open to accepting unconventional forms of payment in order to expand legal services to communities with limited capital. This includes working for a service or a desired good rather than for money. Planning lawyers are in a unique position to foster urban change and sharing law should be a tool that all planning lawyers working with low-income communities should adopt. ♦

PACE Financing for Green Economic Development

by Gregory W. Lavigne, Jr. & Beau F. Zoeller

Gregory W. Lavigne, Jr. and Beau F. Zoeller are project finance attorneys at the law firm of Frost Brown Todd LLC. Greg received a Juris Doctor and Master of Urban Planning from the University of Michigan. Beau obtained his Juris Doctor from the Indiana University Robert H. McKinney School of Law.

Since the economic downturn, governments have given significant attention to developing creative ways to encourage business and community growth as conventional development opportunities have become less attractive. Competition amongst metropolitan areas is growing as governmental income streams become more stressed and infrastructure demands continue to mount. At the same time, diminishing resources and environmental consequences are influencing constituent demands, increasing the pressure on governmental officials to seek ways to incentivize efficiency and renewable energy. The planning and zoning functions of state and local governments are correspondingly faced with significant public pressure to give due attention to clean and efficient energy initiatives to affect the dual public purposes of creating livable, healthy environments and supporting economic growth and development. While there are a number of ways to address these challenges, a new incentive tool commonly referred to as “property assessed clean energy,” or PACE, can be an effective, yet simple option that can assist with both efforts.

While there have been experiments with tax credits, grant programs, and other “green” development incentives, governmental spending contin-

ues to face tremendous scrutiny as the economy continues its recovery. This results in justifiable caution in the direct expenditure of public funds. Solutions like PACE alleviate these concerns by providing property-based financing for privately owned alternative energy and energy efficiency projects. The types of projects authorized by PACE legislation can be defined as broadly or narrowly as desired, but expansive definitions are often used to encourage any permanent improvement that decreases water or energy consumption or demand. This allows physical plant improvements,



such as replacement of HVAC systems or green roof replacements, to qualify alongside more traditional green energy projects such as solar panels or heat pumps. This gives local planning and zoning departments a flexible and powerful incentive for business retention and growth. By applying the economic development and planning concept of a “special assessment”

to energy projects, a local government can provide longer term (and possibly lower interest rate) financing solutions that property owners can use to make an otherwise infeasible project a viable investment.

There are several benefits to PACE financing that, if effectively used, can positively impact property owners, local governments, and the community as a whole. Depending on how statewide PACE legislation and local implementation is structured, such a program may:

- Assist state and local governments in achieving energy and climate goals.
- Allow planners to encourage redevelopment and growth by offering PACE financings only in targeted incentive districts.

PACE Financing

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- Place financial burdens only on those property owners who voluntarily choose to participate in the PACE program.
- Provide a lower cost and a lower interest rate than traditional financing.
- Incur no upfront costs or investments for business owners, as PACE can provide up to 100% of project costs (freeing up capital for other business growth and expenditures).
- Provide longer-term financing compared to accessing traditional lending sources like a line of credit or short-term commercial loan.
- Incentivize triple-net lease landlords to make beneficial energy improvements.
- Allow transfers of debt associated with long-term capital expenditures to subsequent project owners, as PACE assessments attach to real property.
- Promote local jobs by providing more cost-effective financing for capital expenditures.
- Increase long-term property values because of gains in energy efficiency and the ability to market properties as “green.”

Leveraging PACE to use the powerful tools above is gaining traction across the United States. PACE was first introduced in California in 2008, and many other states have followed the trend and enacted specifically tailored PACE legislation. Today, thirty-one states and the District of Columbia have adopted legislation, and significant growth in implementation of commercial PACE programs occurred in 2011 and 2012. If your state has already passed legislation, implementation of a PACE program is as straightforward as following the statutory requirements; those that have not taken that step will need to pursue a strategy to create PACE legislation that suits the needs and goals of the state.

Most pieces of PACE legislation have a few common themes that make implementation of the program relatively consistent across the United States. 1) There must be governmental action to establish PACE locally in order to create the ad-

ministrative entity that will implement the program. This includes setting out the boundaries of the financing district, managing applications for assessments, and working with the assessing entity, which is typically the local government responsible for levying property taxes. 2) Participation in PACE programs is completely voluntary, as property owners must identify the energy project and apply to the PACE district to have the assessment levied against the benefited real property. 3) Once the assessment has been approved, proceeds from bonds or other financing (including private

While there are a number of ways to address these challenges, a new incentive tool commonly referred to as “property assessed clean energy,” or PACE, can be an effective, yet simple option that can assist with both efforts.

financing) are provided to the property owner to pay for the energy project upfront. This financing, whether a loan by the PACE district, a governmental revolving fund, or a conventional loan, is secured by the special assessment, which creates a senior governmental tax lien on the financed property. 4) Finally, the property owner pays debt service on the financing through their yearly property tax bill for up to twenty years, and upon full payment of debt service, the lien is released.

Over the past five years, property assessed clean energy programs have evolved into a powerful economic development tool that both provides unique incentives for energy efficiency improvements and encourages growth in our community’s businesses. In today’s challenging economy, PACE provides invaluable tools for any planning or economic development department seeking to collaborate with local businesses and provide resources without sacrificing limited public funds. For more information on implementing PACE nationally or in your state, please visit www.pacenow.org or contact the authors at glavigne@fbtlaw.com (Greg Lavigne) and bzoeller@fbtlaw.com (Beau Zoeller). ♦

How to Discover a Wolf in Sheep's Clothing

by Adam Simon

Adam Simon is a partner in the Zoning and Land Use Group of the firm Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C. His practice focuses on public finance, zoning and economic development, real estate law, and telecommunications. Adam combines his experience in economic development and public finance to counsel municipalities on the leveraging of public debt financing and private investment to create new public improvements and enhance economic development opportunities. He has helped to organize special service areas, business redevelopment districts and tax increment financing (TIF) districts. Mr. Simon also counsels the firm's clients on cellular zoning and ground leases, right-of-way management and franchising.

Imagine that you are the manager of a community where the corporate authorities have placed a priority on economic development. Visualize further that you have finally landed a premium retailer (call it "Big Box") that could realistically close some of the persistent holes in your budget that haven't been filled since 2008. The corporate authorities are excited and ready to give you a bonus for pulling the deal together.

Now, envision this: Your residents - the ones who have been clamoring for more stores - begin appearing at the plan com-

mission to challenge the proposed development plan. Next, they hire an attorney and a public relations firm to promote a negative image campaign against Big Box, accusing it of treating its employees poorly and having a general disregard for the environment. Then, once your Village finally approves the project after many nights of public hearings and meetings, the residents file suit

If you don't believe this scenario could happen, you would be mistaken; it has happened before and will happen again.

for violations of due process and tie the development up in court for two more years. Finally, even though the Village and Big Box prevail in court, the market's support for the project has gone away in favor of other deals that were on a fast track. All you have left is a paper development that may never become bricks and mortar.

As your head spins looking back on the past two years, you begin to wonder how the residents became so well organized and had so much money to support their cause. Then, out of the blue, you receive an anonymous tip that the mastermind behind the opposition, and the source

of all the financial support, was actually a local retailer who was fearful of how the competition would affect its profits. The owner of the local business, call it "Ma and Pa", had hired a company specializing in organizing opposition efforts. That company engaged agents, using pseudonyms, to stir unrest, start a grassroots campaign against the development, and hire the attorney responsible for the lawsuit. You finally learn that Ma and Pa's entire goal was just to create delay and expense to deter the Big Box development, and there was no bona fide objection to any part of the plan.

If you don't believe this scenario could happen, you would be mistaken; it has happened before and will happen again. A story very similar to this is described in the case *Rubloff Development Group, Inc. v. Super-Valu, Inc.*, 863 F.Supp.2d 732 (N.D. Ill. 2012). In *Rubloff*, our fictional Big Box sued Ma and Pa and their counterparts on a variety of claims which all allege how they wrongfully interfered with the project. The Court found that the actions performed by Ma and Pa were protected from liability and Big Box did not have a claim for relief.

Ma and Pa in *Rubloff* were protected by a judicial concept called the *Noerr-Pennington* doctrine, a principle which is designed to protect a party's First Amendment rights against

Wolf in Sheep's Clothing

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the threat of litigation by a party opposed to the actor's speech or conduct. The *Noerr-Pennington* doctrine extends "absolute immunity" from antitrust laws to businesses and other associations when they join together to petition legislative bodies, administrative agencies or courts for action that may have anti-competitive effect. This is particularly true when part of the petitioning is a publicity campaign directed at the general public and seeks legislative or executive action. These efforts enjoy "antitrust immunity even when the campaign employs unethical and deceptive methods." *Id.* at 741 In *Rubloff*, the doctrine was extended specifically to protect actors participating in a municipal legislative proceeding related to the grant of zoning authority.

The philosophy behind the *Noerr-Pennington* doctrine has been incorporated into State law as well. The Citizen Participation Act, enacted in Illinois in 2007, implements the public policy that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence (735 ILCS 110/1, *et seq.*). The Act immunizes genuine First Amendment activity from litigation aimed specifically at chilling such conduct and, more importantly, carries the risk of the award of attorneys' fees to the defendant.

So if a party seeking to oppose zoning applications related to new economic development is granted such strong protection under State and Federal law, what can a municipality do to encourage honest debate and avoid covert and misleading opposition? Principally, the corporate authorities and their subordinate administrative bodies need to adopt strong procedural rules governing the conduct of interested parties and the presentation of evidence. Cities can find authority to create and enforce strict rules in both the Open Meetings Act (5 ILCS 120/2.06) and the Illinois Municipal Code (65 ILCS 5/11-13-22), respectively, depending on whether the forum is a board meeting or a public hearing. Such rules should aggressively protect the integrity of the proceeding in reliance on the governing body's significant interest in effectively conducting its business. Importantly, courts, in cases such as *Rana Enterprises, Inc. v. City of Aurora*, 630 F.Supp. 912 (N.D. Ill. 2009), have found that a municipality does not violate the First Amendment when it enforces reasonable rules on public participation that advance a legitimate public purpose. Ultimately, limiting misrepresentations and fraudulent misstatements through the enforcement of strong procedural rules will help avoid deceptive practices that lead to cases like *Rubloff* and may even save your economic development.

This was originally published in the Illinois City/ County Management Association (ILCMA) newsletter last April. ♦

PLD Annual Social Event

For the last three years PLD has organized a social event at APA's national planning conference, in addition to its business meeting. This year at Las Vegas' White Oak Kitchen & Cocktails, members and guests enjoyed great conversation over delicious appetizers and drinks. We had a wonderful time and will organize another PLD happy hour in Seattle in 2015. Keep an eye out for information on this year's upcoming social event!



Opinion Commentary: Toward Authentic Public Engagement

by Timothy G. Mara, JD, AICP

The content of this commentary reflects the opinion of the author only, not the American Planning Association, the Planning and Law Division, or any other party.

Mr. Mara is a graduate of the University of Cincinnati's planning program and worked for several years for the Ohio-Kentucky-Indiana Regional Council of Governments and for the U.S. House of Representatives in Cincinnati before graduating from Northern Kentucky University's Salmon P. Chase College of Law. For the last thirty-five years, Mr. Mara has been engaged in the private practice of law. His practice is largely concentrated in zoning and other local government matters, and he generally represents residents who are in opposition to proposed development that they view as inappropriate or poorly designed. On occasion, Mr. Mara has also represented local governments and even developers. He also served a four-year term as an elected trustee of Green Township, one of the most populous of Ohio's one thousand townships.

There are at least three "sides" to every land use controversy, but you might not know that from some of the sessions at this year's APA conference in Atlanta. With few exceptions, we heard from only the perspective of the staff of the public entity doing the review and from the perspective of the developer,

but overlooked was the perspective of the neighboring property owners and advocacy groups – the opposition. When opposition was mentioned at all, it was with pejorative terms like "NIMBY", and we were schooled in how to overcome and "engage angry, ill-informed citizens."

Opponents can be a planner's best friend in achieving quality development, if only planners will recognize that fact and listen.

We scheme to minimize opposition by promoting strategies to suppress opponents' effectiveness with charrettes and other structured games that eat up the clock and deter individual opponents from hearing like-minded people with whom they might join and – heaven forbid – prevail! Last year, I was dumbfounded when a facilitator began a charrette in my own neighborhood with a protracted round-robin of "patty-cakes" and a group sing-along that consumed a half hour before the work even began. Such nonsense is designed to knock the starch out of any opposition.

Call me naïve or old-fashioned, but there was a time when maximizing public participation was a desirable end in itself; and if the public didn't want

something, well that's what we called democracy. Somewhere along the line, we planners decided that it is our job to facilitate development rather than be the gatekeepers. That may be understandable in areas so desperate for jobs that poor development is better than no development, but in most suburban communities, development still does just fall in the door. I think it's time for planners to stop being so cozy with developers and to return to their traditional role as professional, neutral reviewers of development proposals.

Yes, there will always be the occasional screwball who shows up at a public hearing with some bizarre take on the issues or the occasional political extremist who sees an international conspiracy to take away our freedom behind even the most modest development proposal. But, most opponents come to public hearings because of sincere concern that the proposed project just is not good for their neighborhood or could be done better. And, it's been my observation that they are often right.

Opponents can be a planner's best friend in achieving quality development, if only planners will recognize that fact and listen. There are many pearls of wisdom in what the public has to say, even if not clearly articulated. ♦

Student Research Memorandum

This section features memos written by students working at the Land Use Law Center at Pace University School of Law, covering a wide range of topics of national interest.

Lessons Learned from Recent RLUIPA Case Law

by Sameer Ponkshe

Sameer Ponkshe graduated from Pace Law School in May 2014 with a J.D. and a Certificate in Environmental Law. While at Pace, he served as the Productions Editor for the Pace Environmental Law Review.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) is a federal law that was enacted in response to discrimination against religious uses through enforcement of land use regulations. 42 U.S.C.A. § 2000cc(a)(1). The act's provisions prevent governments from imposing a "substantial burden" on religious exercise, and federal courts have come to define this as a governmental authority putting "substantial pressure on an adherent [of a religion] to modify his behavior and violate his beliefs." *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006). Courts also have established that the burden imposed must be more than an inconvenience on religious exercise. If the religious group is able to prove a substantial burden, then the municipality must be able to show that their land use regulation was (a) in furtherance of a *compelling governmental interest* and (b) the

least restrictive means to achieve that interest.

Congress signed RLUIPA to give religious groups protection against land use discrimination, but it has been used on the offensive often, sometimes producing costly results for municipalities both in terms of attorney's fees and restructuring of land use regulations. Therefore, municipal governments must be cognizant of RLUIPA such that they are well-positioned to shield themselves from expensive, time-consuming litigation. This article presents an update on recent RLUIPA case law from around the country and draws important conclusions from this case law to aid municipalities in conducting their affairs.

Recent RLUIPA Case Law

Chai Center for Living Judaism, Inc. v. The Zoning Board of Adjustment for the Township of Millburn, No. ESX-L-9244-11 (New Jersey Superior Court 2013)

In 2010, the Chai Center for Judaism applied to the Township of Millburn Zoning Board for a variance to construct a 16,500 square foot synagogue on 1.8 acres in a residential zoning district. Some neighbors opposed Chai Center's application because they did not believe in

amending the town's land use plans for a single group and argued that if their land use plans are to be amended, it should be done on a town-wide basis in a legal manner. In February 2012, the ZBA found that, pursuant to Millburn's zoning ordinances regarding minimum acreage for houses of worship, the 1.8 acres was too small for the proposed building and denied the area variance. Shortly thereafter, Chai Center filed suit with the New Jersey Superior Court.

Unlike houses of worship, which require a minimum of three acres, a school use under Millburn's zoning ordinances needs just two acres. In addition, parking areas for houses of worship must be adequately screened and traffic separated as much as possible from nearby residences. Also unlike houses of

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Student Research

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worship, schools have no minimum parking requirement. The New Jersey Superior Court found that there was nothing express in the town's zoning ordinances or the record explaining why houses of worship were treated differently than schools as to the required lot size. In its decision, the court treated schools as a fair comparator to houses of worship. When a court identifies a fair comparator being treated on different terms than a religious group, it then looks to the municipality for some explanation as to why there is unequal treatment given that the two land uses are relatively similar. The ZBA failed to give a convincing reason behind the zoning ordinance's minimum lot size requirement of two acres for school uses while a house of worship must have at least three acres. The court also did not accept that the reason for the difference is that small children are dropped off at school. Finally, the town was unable to show a credible

justification for imposing minimum parking requirements on houses of worship but not on schools. **Holding:** Millburn's acreage and parking provisions for houses of worship are invalid because no compelling reason was presented for treating schools and houses of worship on unequal terms. Chai Center's motion for summary judgment was granted.

Candlehouse Inc. v. Town of Vestal, New York, No. 3:11-cv-0093 (DEP) (N.D. NY 2013)

Candlehouse Teen Challenge (Candlehouse), a Christian-based rehabilitation center, wanted to combine its residential campus and work training programs with its religious component at one central location. In September 2008, it purchased two properties in Vestal, New York that would support up to twelve students, two staff, and a housemother. However, the property was located in an R-1 zone that specifically prohibits, among other things, boarding and/or rooming house accommodations for not more

than four, non-transient roomers, multiple family dwellings, and nursing or convalescent homes or sanitariums. Candlehouse wrote to the Code Enforcement Officer claiming that the proposed use of the Property constituted a "family/functional equivalent of a family use under the Town of Vestal Code," but the CEO did not agree and denied the permit.

In January 2011, Candlehouse sued the town in a federal district court alleging violations of RLUIPA, among other claims. The court found that Candlehouse failed to provide evidence that denial of its use of the property forced it to modify its religious behavior in any way. The zoning ordinance permits a residential facility for up to five unrelated persons, and Candlehouse did not show that by precluding it from housing an additional seven students, the town has "coerce[d] it to change how it operates its program in relation to its religious exercise." The court also did not agree with Candlehouse's argument

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Coming Soon: New and Improved PLD Website!

In 2014, PLD phased out its old Wordpress website and is improving its [official APA website](http://www.planning.org) at www.planning.org. In the coming months, we will unveil the enhanced PLD website, which will feature an upgraded and more user friendly *Resources* page with brand new resources, including a page dedicated to highlighting new publications by PLD members and several new links to outside resources for PLD members to explore. In addition to general updates, the new site will provide a robust *News & Events* page listing upcoming PLD-related events, as well as PLD business documents. The updated site will include a mix of pages available to the public and those available only to PLD members. We will let you know when this process is complete and encourage you to come visit the new and improved PLD website at www.planning.org/divisions/planningandlaw/!

I Read it in the Blogs....

By Roisin Grzegorzewski

This column features a roundup of land use issues as reported in recent blogs. We provide a brief summary of the posts, with links to the original postings. This quarter we focus on issues of pedestrian-friendly / Complete Streets planning and regulation.

A new Complete Streets bill was recently introduced in the U.S. Senate. Implementing Complete Streets policies is a growing trend throughout the United States. The policies have been linked to providing for safer roads, less traffic congestion, higher property values, and healthier families. Mark Begich (D-AK) and Brian Schatz (D-HI) have introduced the Safe Streets Act of 2014 (S. 2004), which requires that within two years, each state and metropolitan planning organization (MPO) adopt a Complete Streets policy that ensures that all new federally funded transportation projects accommodate the safety and convenience of all users. [Read the Blog Here...](#)

Berkeley Law's Center for Law, Energy & the Environment (CLEE) filed an amicus brief in a California Court of Appeals case, *Cleveland National Forest Foundation v. San Diego Association of Governments (SANDAG)*. The case challenges the State's first Regional Transportation Plan/Sustainable Communities Strategy for its failure to properly analyze and mitigate environmental impacts, as well as its

failure to consider viable alternatives that would have prioritized public transit and smart growth solutions over highway expansion. The plan emphasized highway expansion and rejected alternatives that would have encouraged growth to infill locations, increasing public demand for walkable communities with less traffic congestion and air pollution. [Read the Blog Here...](#)

Jack Wells, chief economist at the U.S. Department of Transportation and an architect of the innovative Transportation Investment Generating Economic Recovery (TIGER) grant program, gives advice to people that are applying for bike project grants. The advice is helpful to anyone trying to win support from public officials for a pedestrian-oriented bike project. Wells suggests that you frame your pitch correctly, put a realistic dollar value on all the advantages of bicycling, and focus on safety benefits. [Read the Blog Here....](#)

A group of elected officials in New York City asked Governor Andrew Cuomo to include dedicated funds for bicycle and pedestrian projects in his executive budget. The call to establish a dedicated bike-pedestrian fund in the state budget was motivated by the need for safer streets for neighborhoods that have not yet seen any major im-

provements in pedestrian infrastructure. [Read the Blog Here...](#)

State Complete Streets initiatives have faced some local opposition. The County Commission in Lenawee County, Michigan overrode the opposition of state government influence from the County Parks Commission, the Road Commission, and several townships, in favor of economic growth. The resolution, "Comprehensive Transportation Systems," passed by a 6-2 vote. Some of the concerns of the community included possible claims of eminent domain threatening private property rights if the Initiative passed. [Read the Blog Here...](#)

Eau Claire, Wisconsin has been discussing potential changes to the city's Zoning laws to make new construction more conducive to biking and walking. Nothing has been drafted yet by city planners, but if the Plan Commission finds that changes to the city's zoning laws are warranted, the laws would be drafted for review and potential approval in the spring. The discussions will focus on Eau Claire's current standards in comparison to what other walkable cities are doing. [Read the Blog Here...](#) ♦

Blogs by PLD members

Do you have a blog that you think we should mention in the next PLD newsletter?

Send the link to:

pld.newsletter@gmail.com

Webinar Initiatives Update

by David Silverman

PLD's Education & Outreach Committee organized several webinars in 2014. On July 18, 2014, PLD co-hosted **Land Use & Climate Change: 20 Years After Lucas** with the APA Webcast Consortium. In *Lucas v. South Carolina Coastal Council*, the U.S. Supreme Court established the "total takings" test for evaluating whether a regulatory action constitutes a taking that requires compensation. Panelists, including PLD members John Nolon and David Silverman, reviewed planning-related U.S. Supreme Court decisions, from the landmark *Lucas* case through the recent *Koontz* decision and offered useful tips for navigating regulations while protecting a community's environment.

On October 22nd, PLD hosted **Sex, Guns & Drugs: Planning for Controversial Land Uses**, presented by Dan Bolin and Greg Jones from Ancel Glink *et al.* in Chicago. The U.S. Constitution guarantees freedom of expression, freedom of religion, and the right to bear arms, but businesses that rely on these constitutional guarantees continue to generate controversy in communities across the country. To compound matters, state legislatures from Arizona to Massachusetts have been busy granting new – and in many cases, previously unheard of – rights to marijuana and firearm retailers. This has rapidly

drawn planners and zoning practitioners into the debate over how these businesses best fit into their communities, and whether their communities are legally obligated to accommodate these uses in the first place. This webinar addressed these issues in detail and presented regulatory strategies from around the country. This program offered 1.5 CM law credits. The recorded webinar is available on [PLD's training page](#) for members to view for free. Please note that CM credit is available only to viewers who attend the live webcast.

Finally, The Education & Outreach Committee will host two upcoming webinars, one focused on fair housing issues and one on ethics. On Tuesday, November 25th PLD will present **Fair Housing, Affordable Housing, and Local Planning and Zoning: Understanding the Obligations and Reducing your Community's Legal Risk** from 2:00 to 3:30 PM EST. During this webinar, Don Elliot of Clarion Associates and Brian Connolly of Otten, Johnson, Robinson, Neff & Ragonetti, will discuss the connection between local land use regulation and the federal Fair Housing Act. This program offers 1.5 CM law credits. For more information and to register go to: <https://www.planning.org/storage/product/?ProductCode=EVEN T PLD NOV>.

PLD also looks forward to hosting another engaging ethics program– targeted to both professional and citizen planners – that will review, among other things, the AICP code of ethics and state common and statutory ethical issues like conflicts of interest. The ethics program is being designed with overlap information for attorneys who practice in front of zoning and planning boards and will include 1.5 hours of CM ethics credits. PLD will host this webinar in 2015, so lookout for this registration announcement! ♦

Attention Students!

The Student Representative Council is looking for a Region V Representative for the 2014-2015 year.

The student must be from Region V and be able to attend the National Planning Conference in Seattle as well as the fall leadership meeting in Washington DC next year. (APA offers reimbursement for these events.) The SRC meets monthly via Skype. This position will extend through Dec. 31, 2015.

The position description and questionnaire are located at: <https://www.planning.org/leadership/students/opportunities.htm>

Questions?
Please contact Katie Poppel (kapoppel@gmail.com) or Lisandro Orozco (orozcolisandro@outlook.com)

Amicus Committee Report

by Carrie Richter and Edward J. Sullivan

The authors of these summaries are members of the American Planning Association's Amicus Committee.

Since the 2014 National Planning Conference, APA's Amicus Curiae Committee has been involved in a number of key cases impacting planning law, *T-Mobile South, LLC v. City of Roswell, Georgia*, before the U.S. Supreme Court, *Cooperstown Holstein Corporation v. Town of Middlefield* before the New York Court of Appeals, and *Reed v. Town of Gilbert*, pending review before the US Supreme Court.

T-Mobile South, LLC v. City of Roswell, Georgia

T-mobile South, LLC (T-mobile) submitted an application to construct a cell tower resembling a man-made tree in Roswell, Georgia. After a two-hour public hearing, city council members voted to deny the application. Two days later, Roswell sent T-Mobile a letter notifying the company that the application was denied, without further elaboration, and referred the company to the minutes of the public hearing. T-Mobile sued Roswell and claimed that the city had not provided substantial evidence that would support a denial of the application. T-Mobile also argued that, by prohibiting T-Mobile from building the structure, Roswell violated the Telecommunications

Act of 1996 (TCA). The TCA provides that a state or local government's denial of "a request to place construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

T-Mobile has argued before the Supreme Court that the "in writing" requirement requires an explanation for the decision considering the approval criteria. It claims that by not requiring such analysis, applicants will have no other choice but to seek judicial review of decisions to determine the reasons for denial, significantly increasing the costs of providing communications services. Roswell, along with other amici, representing state and local government groups as well as the American Planning Association (APA), argued that requiring a detailed analysis for the decision would impose stringent procedural requirements that (1) is not borne out in the plain language of the TCA and (2) imposes significant additional costs on and unreasonably burden the ability of local governments to carry out land use regulation. According to the APA amicus brief, although zoning and land use personnel is not a specifically identified category, census data from 2012 reveals that 71% of municipalities do not have a single full-time paid employee to handle "other government

administration," including land use, and others in that group 33% have no more than one part-time paid employee. Finally, the amici argue that if the City erred in not providing a more detailed explanation of its decision, the remedy was a remand and not a reversal giving approval for tower siting without any local government review.

Oral argument is scheduled for November 10 and a decision is expected in Spring, 2015.

Cooperstown Holstein Corporation v. Town of Middlefield and Wallach v. Town of Dryden

The towns of Middlefield and Dryden enacted zoning laws that entirely banned gas drilling and associated activities within their jurisdictions. The plaintiffs, a private gas company in one case and a private property owner in the other, claimed that a supersession clause in the State Oil, Gas, and Solution Mining Law (OGSML) preempted local authority. After reviewing the plain language of the OGSML, the statutory scheme, and its legislative history, the highest court in New York concluded that the legislature did not expressly or by implication preempt the power of localities in the state to regulate land use. Preempted, under the OGSML, in the court's view, was the power to regulate the details, procedures or

Amicus Report

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operations of the oil and gas industry, not matters normally associated with land use regulation. The decision rested on both the Municipal Home Rule Law (MHRL) and the Town Law. The MHRL contains a seldom-cited provision granting authority to local governments, including towns, cities, and villages, to protect and enhance their physical and visual environments. The Town Law is New York's version of the Standard Zoning Enabling Act, which was the model for most state statutes that delegate zoning authority to local governments. The APA Amicus Committee filed a brief in support of the Towns' positions. The Court of Appeals held that the "home rule" provisions of the New York Constitution allowed local governments to adopt regulations not inconsistent with state law, but required a clear expression of legislative intent to do so. The court undertook a lengthy exercise in statutory interpretation and concluded that, while state law provided that state oil and gas law superseded local laws and ordinances "relating to the regulations of the oil, gas and solution mining industries," that prohibition did not extend to zoning regulations, but only to the manner in which such mining operations were undertaken.

A portion of this summary comes from Prof. John Nolon's post for the Law of the Land Blog.

Reed v. Gilbert

This case involves the validity and constitutionality of Defendant Town of Gilbert's sign regulations as applied to temporary directional signs for church services in an adjacent town. Plaintiffs asserted they were under a religious injunction to convert others and to invite them to their services, which they did, inter alia through these temporary directional signs. Defendants' sign code required a permit for signs but exempted three categories from these requirements – temporary directional signs of a certain size and placement which are allowed only twelve hours before and one hour after the event that they advertise; political signs dealing with a candidate or ballot measure placed at any time before and within up to ten days after election on that candidate or ballot measure; and ideological signs which are not limited as to time or number. Directional signs have the least amount of allowed area, while ideological signs have the most.

The Ninth Circuit decision framed the question in this case as whether the differing requirements for each of the three categories of noncommercial speech could be justified without reference to the content of that speech. The Ninth Circuit responded that the distinctions between temporary directional signs, ideological signs, and political signs are content-neutral. It was not improper to review the content of speech to determine whether a rule of law applied to a course of

conduct. With regard to the differential treatment of the categories of noncommercial speech, the Ninth Circuit reasoned that the temporary directional sign regulations were, standing alone, content-neutral and not in competition with the other noncommercial categories; moreover, those regulations were reasonable with respect to their purposes. The gist of this decision is that all noncommercial speech exemptions need not be treated alike, so long as each of the exemptions in content-neutral, narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels of communication.

The APA Amicus Committee recently agreed to participate and is working on drafting a brief, which is due just before Thanksgiving. ♦

Member Activities

Share your pictures with us!

We want to know what PLD members are up to! Did you see another PLD member at a networking event? Hold an exciting conference? Participate in a Habitat build? Join other PLD members in a 5K walk?

Whatever your story, send your pictures and captions to pld.newsletter@gmail.com and we will publish them in future newsletters.

CM/MCLE Accreditation Checklist

In the rapidly evolving fields of planning and law, continuing education is not only important to maintain competency, it is mandatory. For planners, the AICP requires 32 Certification Maintenance (CM) credits over a two-year reporting period, with a minimum of 1.5 credits coming from planning law and 1.5 from ethics. For lawyers, Mandatory Continuing Legal Education (MCLE) credit requirements vary from state to state. For example, Illinois requires 30 credits over a two-year period.

Planning and Law Division webinars offer the opportunity for both CM and MCLE credits. PLD encourages members to suggest and create webinars that meet continuing education requirements for planners and lawyers. However, navigating CM/MCLE certification can be complicated. In order to assist those interested with creating and presenting webinars, we have created a checklist to ensure members producing a webinar with PLD will be able to meet continuing education requirements:

CM Certification:

1. Select a point of contact for administration of the event and contact with APA.
2. Coordinate with or register as a CM provider. PLD is a registered CM provider and is available for members to use for this purpose.
3. Complete the [APA's Template for Data Collection for CM Activities](#) for a Distance Learning event. Required information includes:
 - Name of Session
 - Topic
 - Time
 - Event description, including planning related learning objective
 - Names and bios of all speakers
 - Explanation of how the course utilizes multiple methods of learning

- Description of the mechanism for gauging acquisition of content such as:
 - Multiple Choice Tests
 - Essays
 - A question and answer forum (or other interaction between audiences and presenter)
 - Online discussion board
 - Additional methods, as described by the CM provider
 - Explanation of how the event will meet the law or ethics CM requirement if appropriate
4. Acknowledge the source of all materials used in the presentation and keep copies of all copyright and reproduction permissions
 5. Submit all of the above information to PLD's Education & Outreach Chair who will then process it through the CM Provider dashboard and track the status of approval
 6. When hosting the event, keep a registration log, distribute and collect event evaluations, and notify attendees how to register the CM credit in their event log
 7. After the event, maintain the registration log and evaluations for two years

MCLE Certification:

The APA is only accredited to provide MCLE credits in Illinois. For an individual attorney to receive webinar credits from his or her state, [assuming the state approves distance learning credits](#), he or she must apply directly to the state board. An individual applying for MCLE credits would need to submit the documents listed below and the Certificate of Completion with the webinar's final attendance list. Generally, when working with APA to achieve certification, MCLE credit certification requires:

1. A timed agenda stating when the course starts and ends with segmented breaks and content sections. The agenda should include each segment's start and end times, as well as a title for each segment that indi-

CM/MCLE Checklist

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- cates the content or use of that time period (for example, 9:00-10:00 AM – Demonstration of client interview; 10:00-11:00 AM – Discussion of interview demonstration).
2. The written materials given to participants at or before the course – or if they exceed 50 pages, a 25-50 page sample
 3. A brief biography for each faculty member. If he or she is an attorney, the applicant must include at least the name, title, and employer. If he or she is a non-attorney, the applicant must include at least the name, title, employer, and a minimum one- to two-sentence description of how the speaker is qualified to speak on his/her topic
 4. For any course with attendance fees, a financial hardship cost option (if the course costs over \$500, 50% off – otherwise an amount at the discretion of the organizer)
 5. An application fee
 6. When hosting the event, keep a registration log of all attending attorneys including name, city, and state to be kept for three years

PLD webinars potentially can offer the triple whammy: CM, CM law, and MCLE credits – which makes accredited programs highly desirable for those trying to maintain their certifications. In addition, PLD has identified webinars as an important way to raise the profile of the Division within APA, as well as Division revenues, enabling PLD to expand programming and outreach to members. ♦

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PLD Elections

At our Annual Business meeting on April 28th former PLD Secretary/Treasurer Meg Byerly became Chair-Elect, and Evan Seeman joined leadership as the new Secretary/Treasurer. Former Chair-Elect Jennie Nolon Blanchard assumed the position of Chair and former Chair Carrie Richter will remain on as our Past-Chair for the next two years.

Meet Evan Seeman, our newest addition to PLD leadership!

Evan Seeman is a land use and zoning lawyer at Robinson & Cole LLP in Hartford, Connecticut. Evan advises clients on meeting requirements for land development and complex real property disputes. He represents municipalities, developers, landowners, and advocacy groups before federal and state courts and local land use agencies. He also counsels clients on the Religious Land Use and Institutionalized Persons Act (RLUIPA) and is a co-author of the blog RLUIPA-Defense (www.rluipa-defense.com), with Dwight Merriam. Currently, Evan is representing a Connecticut soup kitchen in RLUIPA litigation.



Evan is looking forward to serving his professional community as the new Secretary/Treasurer for PLD. For the past two years, Evan has served on the Planning & Law Division's Education & Outreach Committee. He is also active in the Connecticut Bar Association, where he is a member of the Young Lawyers Section's Executive Committee and is the co-chair of the Municipal Law Section. Recently, he was selected as a "Rising Star" in Connecticut ***Super Lawyers®*** in the area of Land Use/Zoning for 2013 (*Super Lawyers* is a registered trademark of Key Professional Media, Inc.).

Movie Review: *Dirt! The Movie*

by Allison Sloto



"Dirt! The Movie," was inspired by William Bryant Logan's book "Dirt: The Ecstatic Skin of the Earth," and narrated by Jamie Lee Curtis. The movie explores the historical, environmental, social, and political importance of the soil beneath our feet. While the beginning of the movie is devoted to exploring the origins and biological makeup of dirt, later segments convey a message of great significance to those involved in the land use field.

While the animations and explanations often verged on the overly simplistic (viewers would be wise to ignore the cutesy animated dirt clods), this is probably because the movie is geared toward a very wide audience, many of whom are likely unfamiliar with the topic. As the movie progresses, be prepared for a parade of interviewees, all

with similarly earnest, rapturous faces as they extol the values of dirt. Children frolic in dust and fling it into the air; farmers grasp dirt in their work-worn hands like a lifeline; biologists bring moist clumps up to their noses and inhale appreciatively; an oenophile even tastes the dirt, solemnly explaining to the camera that the quality of a wine is all about the soil.

The movie then transitions into an overview of the critical threats to our soil- desertification, erosion, degradation, and unsustainable farming techniques (such as monoculture), to name a few. Implicit in this dialogue is the way humans have chosen to shape the land – how increased sprawl and large-scale, industrial farming have led to a disregard for the land. The documentary seeks to frame many of our modern global problems (e.g. war, poverty, hunger, crime) in the context of our mistreatment of dirt — an oversimplification of the issues involved. For example, though unsustainable farming techniques in Third World countries play a large part in their dire living conditions, they should not be blamed as the only cause. Overpopulation, corrupt politics, etc. are all other critical factors that seem to get downplayed throughout the documentary.

The filmmakers next address how these seemingly insurmountable challenges might be

remedied. A common theme throughout the movie seems to emphasize a more spiritual connection to the earth, akin to Aldo Leopold's "land ethic." The movie directors argue that the best way to reverse the rapid environmental degradation caused by us humans is to first restore our own deeper connections to the earth. Much of the focus was on bringing nature back into the urban environment, an endorsement of the concept of "biophilia," the idea that humans are innately connected to and soothed by nature, and bringing nature back into our urban design is beneficial for the health and wellbeing of humans. Doing so also has positive effects for the environment, as greening the urban landscape decreases the heat island effect, absorbs carbon emissions, and helps manage stormwater runoff.

The film highlights specific initiatives intended to re-instill in the populace an appreciation for the Earth, such as a project in Los Angeles that removed impervious pavement from city school playgrounds and planted a garden in its stead. The documentary references studies that purport to have shown that students are happier playing in grass and learning to work in a garden, and have developed a greater appreciation for the natural environment. Another urban initiative is a program at Rikers Island in New York City, where prison inmates are brought out to work in a vegetable garden/greenhouse, as well as plant street trees. This provides inmates with marketable

Dirt! The Movie

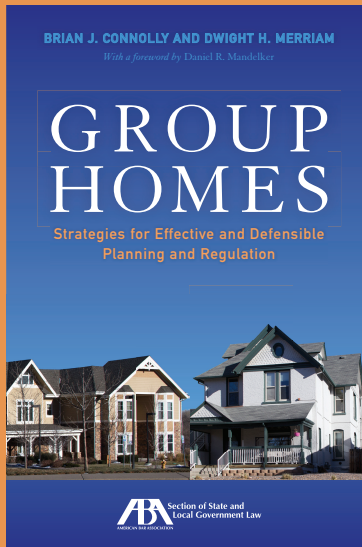
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technical skills in landscaping that they can rely upon after they are released. The re-incarceration rate for the program's members is extremely low.

Finally, the directors visit Majora Carter (the urban revitalization strategist most famous for her work in the Bronx), who gives a tour of her home, which sports its own green roof, rainwater catchment system, and small backyard garden with a compost pile. This showcases a modern, urban home that has managed to reconnect with "dirt" and the natural world. These examples are intended to show that when one strives to reconnect humans with nature, projects result that are beneficial to both the humans involved as well as the state of the environment.

Land use attorneys and planners with an interest in sustainable development and green building will likely find the majority of the movie somewhat boring and slow-moving, with perhaps too much of an emphasis on the "spiritual" approach. However, they will perk up once the movie reaches the actual examples of reintroducing nature into cities. Buried deep under the onslaught of dirt-worship is a critical message for those who deal with issues related to the use of land; we must think more critically about this complex world that lies beneath our feet, and when engaged in planning for development (especially in urban areas), we must be more cognizant of the importance of maintaining connections to the natural world. The kind of future that we build will depend upon it. ♦

New Book Published!



PLD members Brian Connolly and Dwight Merriam have recently completed co-authoring ***Group Homes: Strategies for Effective and Defensible Planning and Regulation***. The full-length book, published by the American Bar Association and co-sponsored by the Commission on Disability Rights, provides insightful, wide-ranging analysis of the legal and practical complications associated with providing housing for persons with disabilities, and is a must-read for PLD members addressing housing issues in their local communities.

More than any other population, persons with disabilities have experienced significant discrimination in their quest for equal housing opportunities. In 1988, Congress passed the Fair Housing Amendments Act, which prohibits discrimination against persons with disabilities by local governments and private landlords. Yet in the quarter century since the Fair Housing Amendments Act's passage, local governments continue to struggle with the legal and practical challenges associated with fair housing for persons with disabilities. Political and legal battles over the siting of group homes have resulted in costly litigation and divided communities in places throughout the nation.

Group Homes provides the most complete analysis available of the law and policy issues associated with housing for persons with disabilities. In a neutral but thorough manner, Connolly and Merriam analyze the requirements of the Fair Housing Amendments Act, discuss its application to zoning, and provide suggestions and strategies for planning for group homes. The book's intended audience ranges from planners to lawyers, government officials, housing providers, community members, and housing activists.

Connolly is a lawyer with the law firm of Otten Johnson Robinson Neff & Ragonetti, P.C. in Denver, Colorado, and Merriam is a lawyer in the law firm of Robinson & Cole, LLP in Hartford, Connecticut.

Group Homes is available for purchase on the [ABA website](#), [Amazon.com](#), and at other retailers.

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that it is financially burdened by operating two separate facilities because it will have to operate two separate properties even if allowed to use the property. **Holding:** The town's motion for summary judgment was granted because the R-1 zoning restrictions do not amount to a governmental action that coerces Candlehouse to change its behavior in relation to its religious exercise.

Bethel World Outreach Ministries v. Montgomery County Council, 706 F.3d 548 (4th Cir. 2013)

Bethel World Outreach Ministries filed suit after it was denied a permit to build a new church in an agricultural reserve in Montgomery County, Maryland. Most of the agricultural reserve was zoned as a "rural density transfer zone,"

which enables developers to purchase rights from landowners in the area and transfer those rights to other areas of the county. The property of the landowner who sells the development rights is then subjected to an easement capping the density of residential development allowed on the property. Bethel's plans for a 3,000-seat church, a school, daycare building, social hall, and offices were rejected in 2005 at the same meeting in which the County approved an amendment prohibiting water and sewer service to private institutional facilities in the transfer zone.

As Bethel was filing for a petition for administrative mandamus in state court, Derwood Bible Church attempted to build a private well and 1,500-seat church in the same zone. During the pendency of Derwood's application, the County approved an amendment, known as the "Knapp Cap," restricting the size of new private well and septic systems in rural density transfer zones. Bethel then modified its plans to comply with the Knapp Cap, but the County soon adopted ZTA 07-07, which prohibits a landowner from building a private institutionalized facility on any property subject to a transfer development easement. The County deferred Bethel's application in April 2008, and Bethel filed suit in District Court a month later.

The District Court granted summary judgment to the County but, upon appeal, Bethel was able to show that the County placed a substantial

burden on them. The court held that when a religious group buys property reasonably expecting to build a church, governmental action impeding the building of that church may impose a substantial burden because there is burden on the delay, uncertainty, and expense of selling the property and finding new one. The court also found it significant that the County offered no mitigating measures to the Church but instead prohibited them from building any church in the area.

Finally, the County's argument that it did not violate RLUIPA because it used the least restrictive means of advancing a legitimate governmental interest was rejected. The County pointed to its interest in preserving agricultural land, water quality, and open space and in managing traffic and noise, but the court did not find that ZTA 07-07 was the least restrictive means of meeting this interest.

Holding: Town's actions violated RLUIPA by imposing a substantial burden on religious exercise through its newly adopted zoning laws, which were not the least restrictive means of meeting compelling governmental interests.

Parish of Jefferson v Daughters of St. Paul, Inc., 113 So. 3d 371 (La. App. 5 Cir. 3/27/2013)

In 2002, the Parish of Jefferson, Louisiana, passed a parking ordinance that required businesses in the Commercial Parkway Overlay Zone (CPOZ) using curbside parking in front of their locations to sign a lease to

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pay the Parish for use of its parking right-of-way. From 2002 to 2008, Pauline Books, a small not-for-profit religious bookstore, refused to sign and pay the Parish for use of the right-of-way for parking. In September 2008, the Parish sued Pauline Books to recover \$18,816 in lease payments that should have been made to the Parish pursuant to the 2002 ordinance. Pauline Books countered that the CPOZ imposed a substantial burden under RLUIPA. The trial court held that RLUIPA did not apply, and the bookstore appealed.

The Louisiana Court of Appeals found that Pauline Books failed to establish a *prima facie* case that the CPOZ imposes a substantial burden on its exercise of religion. The court determined that the leasing of the right-of-way does not infringe on their religious behavior and that the financial burden of leasing is not a great restriction or onus on their religious exercise. Pauline Books did not demonstrate a substantial burden on its exercise of religion but rather an inconvenience experienced by all other businesses in the area. Without a substantial burden, the court held that RLUIPA did not apply, and affirmed the lower court's summary judgment in favor of the Parish. **Holding:** An inconvenience experienced by all other businesses in the area has general applicability, and thus RLUIPA does not apply.

Tabernacle of Victory Pentecostal Church v. Weiss, 2012 WL 6029100 (N.Y. A. D. 2d Dept., 12/5/12)

The property in question, devoid of off-street parking, was split zoned as a business district in the front portion and residential district in the back. In exchange for a waiver of the off-street parking requirements typical for that zone, the Church offered to allow no more than 105 people to enter the sanctuary at one time and to bus half of the church's 60 members to the site using two church vans. The church estimated it would need 8 to 10 parking spaces at most during its peak hours, but the ZBA denied their application for a special exception permit and an area variance to waive off-street parking requirements.

The lower court upheld the denial, but the Church appealed. The appellate court stressed that a special exception is for a use of property that the local government has deemed to be in harmony with existing uses in the zone. The court further noted that religious institutions, while not entitled to an outright exemption to local zoning requirements, should be given some flexibility in attempting to conform to zoning laws. **Holding:** The ZBA must offer reasonable conditions or accommodations before denying an application completely. The ZBA's decision is reversed, and the case is remanded to the lower court with instructions to the Board to grant the church's requested special exception permit and area variance.

Lessons Learned

The stories from these recent cases reinforce the notion that municipal governments must be adequately educated on RLUIPA and its judicial interpretation in order to avoid unwanted changes to their land use plans. Listed below are lessons learned from these cases that can help municipalities successfully defend against an RLUIPA claim before the matter goes to court.

Municipalities must be cognizant of the language in their ordinances as they refer to religious institutions. The *Chai Center* case involved an ordinance that set minimum acreage and parking requirements that were larger for houses of worship than for schools. Any time a municipality explicitly establishes requirements for religious groups but does not do so for other entities, such as schools, they are setting themselves up for an RLUIPA claim. It is difficult to show a compelling interest for treating religious groups on unequal terms, and courts rarely, if ever, find a municipality's ordinances to be the least restrictive means of serving that compelling interest. Thus, if a municipality's zoning code makes specific reference to religion the municipality should consider amending the language such that it is better insulated from an RLUIPA claim.

Ordinances with the best chance of surviving an RLUIPA claim are those that have general applicability. In

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the two cases above in which the municipality prevailed, the ordinance in question applied generally and not just to religious groups. The parking ordinance that was challenged in *Jefferson* applied to every business operating in the parish's Commercial Parkway Overlay Zone and thus was an inconvenience experience by all businesses, not just Pauline Books. In addition, the *Candlehouse* case involved a zoning district that generally prohibited uses such as boarding and/or rooming house accommodations for not more than four non-transient roomers, multiple family dwellings, and nursing or convalescent homes or sanitariums. It is worth noting the other uses prohibited by that ordinance in addition to the one that pertained to the religious group's claim. Had the ordinance allowed use by multiple families and nursing homes, the *Candlehouse* plaintiff could have argued that the net effect of their use was no different than

those permitted uses, and thus they were being treated on unequal terms. Then, the court would have required the town to put forward some compelling interest for treating the uses differently in their zoning code. Such a request by a court usually does not bode well for the municipality.

Avoid denying an application outright and instead offer the religious group some mitigating measures before rendering a final decision. Congress enacted RLUIPA in response to the growing problem of intentional municipal discrimination against religious land uses. If a zoning board flat out denies an application, they are exemplifying the type of abuse that RLUIPA was meant to eliminate. Even though the *Tabernacle* case involved an ordinance that seemed to be generally applicable, the court found problems with an outright denial of the applications. Zoning boards should offer mitigating measures, and they must give consideration to any mitigating meas-

ure that the applicant offers. Failure to do so will seriously hinder a municipality's chances of defending their decision in court.

Once the religious group files an application, any amendments to the zoning code during the application process that affect their application will be suspect. The *Bethel* case is an example of egregious abuse of discretion by the municipal government. As with any case involving religious rights, the governing body involved must be able to distance itself from any notion that it opposes religion in its community. Adopting amendments like the ones Montgomery County did during the pendency of two churches' applications is a tactic that never pays off and will bolster any RLUIPA claim regardless of the circumstances. Instead of adopting new amendments while applications are being processed, municipalities need to study and assess what they already have in their zoning code before any application arises. ♦

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