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# ZONING AND PLANNING LAW REPORT

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## RLUIPA DEFENSE TACTICS; HOW TO AVOID & DEFEND AGAINST RLUIPA CLAIMS

By Evan J. Seeman \*

### I. Introduction

The Religious Land Use and Institutionalized Persons Act (RLUIPA) is almost 15 years old. As a teenager, it may be a little hard to understand. It is natural to fear what you don't understand and it is clear that most municipalities are fearful of RLUIPA. There is some good reason, however, to be concerned about RLUIPA, though most liability is completely avoidable.

These cases are emotionally charged and can be financially and politically draining for all involved. As one federal judge noted, “[f]ew principles are more venerable or more passionately held in American society than those of local control over land use and the right to assemble and worship where one chooses.”<sup>1</sup> Municipalities have much to lose. No municipality wants to be accused of—much less, found guilty of—discrimination of any sort. When a local government loses and a religious group obtains approval to construct a “mega” facility, local planning schemes can be eviscerated.

What municipalities may fear most of all, however, is the potential financial impact of an RLUIPA loss. A prevailing plaintiff can recover its legal fees, which must be paid in addition to the municipality's own legal fees. The threat of these fees, which can reach the hundreds of thousands, even millions, of dollars, could cause local officials to cave to the demands of religious institutions rather than risk an unfavorable result.<sup>2</sup> Still, there are ways to vigorously defend against these claims. Sun Tzu said, “He who knows when he can fight and when he cannot, will be victorious.”<sup>3</sup> Below are some examples of how municipalities can avoid RLUIPA claims in the first instance and, if unavoidable, know when they can and cannot fight them.



## II. It's Okay to Regulate Religious Uses

The best way to avoid and defend against RLUIPA claims is to plan for religious use. While municipalities have much to fear when threatened with an RLUIPA claim, they need to understand that they can regulate religious uses; religious uses are not exempt from zoning.<sup>4</sup> A religious group “has no constitutional right to be free from reasonable zoning regulations nor does [it] have a constitutional right to build its house of worship wherever it pleases.”<sup>5</sup> Generally, it's okay to prohibit religious uses from certain zones, so long as a municipality does not “unreasonably limit” the opportunity for religious groups to locate within its jurisdiction.

On the one hand, RLUIPA's “unreasonable limits” provision states “[n]o government shall impose or implement a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”<sup>6</sup> On the other hand, courts have

consistently recognized “that land-use regulation is one of the historic powers of the [s]tates.”<sup>7</sup>

Municipalities regulate land using zoning and other controls based on comprehensive plans with long-term goals and policies that guide local land use decisions and operate as the constitutions or “blueprints” for development.<sup>8</sup> As with most other uses, municipalities typically allow religious and other assembly uses in certain zones and exclude them from others, all in furtherance of their comprehensive plans. Deference to local planning principles has been used by courts to reject unreasonable limits claims. The Seventh Circuit did so in *Eagle Cove Camp & Conference Center v. Town of Woodboro*, a case involving a religious group that sought to operate a year-round Bible camp in an exclusively residential zone. The court noted that the proposed camp would be permitted in 36% of Oneida County, Wisconsin, with seasonal recreational camps permitted in another 72% of the County.<sup>9</sup> The court rejected the religious group's unreasonable limits claim, and found that prohibiting the Bible camp use on the subject property advanced the comprehensive plan's goal to uphold the rural and rustic nature of the town, including the specific area surrounding a prominent lake in the residential zone. The camp also had a reasonable opportunity to find land elsewhere.<sup>10</sup>

*Eagle Cove* also found that that preservation of the municipality's rural and rustic, single-family residential character in the residential zone was a compelling government interest.<sup>11</sup> Compelling interests are interests of the “highest order.”<sup>12</sup> Although the legal standard for demonstrating a compelling interest is high, existing case law provides several examples, including enforcing zoning regulations to ensure the safety of residential neighborhoods,<sup>13</sup> to ease traffic congestion,<sup>14</sup> and to protect certain other public health and safety

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objectives.<sup>15</sup> Also, a compelling interest must be more than pro-forma reliance on traditional zoning interests. They must be supported by a complete and comprehensive record of the municipality's interests and local action must be tailored to meet those interests.<sup>16</sup> Identifying and planning around compelling interests is especially important to defeat RLUIPA substantial burden claims—the most frequently litigated claims, perhaps because they are the most fact-intensive. If a religious institution establishes that a government action has substantially burdened its religious exercise, a government can escape liability if its actions were taken to advance compelling interests in the least restrictive means possible.<sup>17</sup> Thus, municipalities need to think long and hard about the compelling interests they seek to promote when choosing to enact a regulation or acting on an application. Sit down with your planner and other officials to identify these interests in advance because courts will not look favorably upon after-the-fact justification of government actions.

Treating religious uses differently than other uses based on size and impact is also permissible. Where a Hindu group challenged the Town of Pikeland, Pennsylvania's zoning code as treating religious uses worse than secular uses, the court rejected the claim because the zoning code "seems to treat large and small scale uses differently, and this is not sufficient to draw Defendant's Ordinance into discriminatory territory."<sup>18</sup> Another court found no violation of RLUIPA and stated: "Were there a cause of action for facilities size discrimination, then the Church might have a claim. Rather, this record suggests no hostility or discrimination visited upon the Church that would not also have greeted a Wal-Mart or large hospital or university, where an entity's proposed growth threatened to outstrip the character and size of the city."<sup>19</sup> Limiting the focus to size and impact of proposed uses, including the compelling interests sought to be

advanced through regulation of same, will go a long way in defending against RLUIPA claims.

### III. Create a Surplus of Land for Religious Use

Conducting an annual inventory of all land available for religious use may help to plan for these uses and to avoid or defend against RLUIPA claims. The more land available for religious uses, the better a municipality's chances of defending against an unreasonable limits claim. Readily available space for religious uses can also help in defense against RLUIPA substantial burden claims. One factor considered by some courts is whether there exist alternative properties available for religious use.<sup>20</sup> The more alternatives, the more difficult it will be for a religious group to show than an adverse decision has caused it to modify or forego its religious behavior. The Second Circuit found a substantial burden where the Village of Mamaroneck, New York denied an Orthodox Jewish group's special permit to expand its co-educational day school because of a lack of feasible alternatives.<sup>21</sup> The court credited the testimony of the day school's experts, who testified that the planned location of the school expansion "was the only site that would accommodate the new building."<sup>22</sup> Conversely, the more land there is for religious uses, the more likely a religious group can find an alternative property.

Real estate experts and planners can help municipalities better understand the realities of the marketplace to determine whether they should amend their zoning maps to make more land available for religious use. If a municipality chooses to vigorously defend an RLUIPA suit, real estate and planning experts may be able to convince a court that other sites are available to the religious group for use. A surplus could also help municipalities to defeat claims brought under the statute's "total exclusion" provision—"[n]o government shall impose or implement a land use regulation that . . .

totally excludes religious assemblies from a jurisdiction.”<sup>23</sup> This provision means what it says. Make land available for religious uses and it is defeated.<sup>24</sup> Simple enough, right?

Some religious groups may attempt to use the alleged lack of other sites to attack an adverse zoning decision as substantially burdening their religious exercise, when, in reality, they simply prefer another site. Courts have repeatedly rejected claims of “financial cost and inconvenience, as well as the frustration of not getting what one wants” as constituting a burden on religion.<sup>25</sup> In one case, the members of a synagogue claimed that requiring that it locate in a specific zone substantially burdened its religious exercise because its congregants, including those who were ill, very young, or very old, would be required to “walk farther.”<sup>26</sup> The court was not persuaded: “While we certainly sympathize with those congregants who endure Floridian heat and humidity to walk to services, the burden of walking a few extra blocks, made greater by Mother Nature’s occasional incorrigibility, is not ‘substantial’ within the meaning of RLUIPA.”<sup>27</sup>

One of the first things municipalities may wish to consider when slapped with an RLUIPA suit is to understand the religious needs of the religious group. Would an adverse zoning decision truly infringe its religious exercise or would it instead amount to a matter of preference or convenience on the part of the religious group?

#### IV. If Something Isn’t Right, Fix It: Safe Harbor Regulation

The availability of land for religious uses, alone, may not be enough to defeat an unreasonable limits claim or substantial burden claim. The United States Department of Justice—which investigates allegations of discrimination across the country and sometimes sues to enforce RLUIPA<sup>28</sup>—cautions that courts have found violations of the unreason-

able limits provision “where regulations effectively left few sites for construction of houses of worship, such as through excessive frontage or spacing requirements, or have imposed steep and questionable expenses on applications.”<sup>29</sup> Sometimes, there may be no opportunity to make more land available for religious use. In these situations, municipalities may wish to build into their zoning codes specific mechanisms to allow exceptions for religious uses having difficulty finding land. The first place to start may be with RLUIPA itself. The statute contains a “safe harbor” provision authorizing municipalities to exempt religious land uses from certain policies or practices that might otherwise violate the statute.<sup>30</sup> Although this provision does not detail what municipalities must do to avoid liability, it gives them broad authority to act. Adding this provision, verbatim, to local codes would be a good first step.

#### V. The Same Process with the Same Procedures

When excluding religious uses from certain zones, municipalities must be careful to avoid the perception of unequal treatment. RLUIPA requires that religious uses be treated as well as any comparable, secular assembly use.<sup>31</sup> Imposing a different, more onerous application process on a religious institution may support a violation of the equal terms provision. Different courts have established different tests to determine unequal treatment.<sup>32</sup> Several courts have found violations where zoning codes allow secular assembly uses (i.e. clubs, meeting halls, community centers, auditoriums, theatres, recreational facilities, and the like), but prohibit religious uses.<sup>33</sup> Violations have also been found where religious uses are allowed, but subject to different, more stringent standards than secular assembly uses (i.e. as of right versus specially permitted uses). A recent example is *Corporation of the Catholic Archbishop of Seattle v. City of Seattle*.<sup>34</sup> There,

the federal court ruled that the City violated the equal-terms provision by requiring a Catholic high school to apply for a variance to put up 70-foot high light poles for its athletic field in a residential, single-family zone, while allowing public schools to do the same by special exception.<sup>35</sup> The City argued that the differential treatment would “foster[] the provision of public facilities by government agencies.”<sup>36</sup> Presumably, making it easier for such light posts to be placed at public athletic fields would encourage members of the public to use the public fields over private fields (without the same lights). But the court rejected this argument because the City’s justification did not relate to “accepted zoning criteria” and it “appeared nowhere in the relevant sections of the land use code.” The City’s justification instead appeared in external sources, including the Washington’s Growth Management Act.<sup>37</sup>

Important lessons are learned from *Catholic Archbishop of Seattle*. Municipalities should develop comparable regulations for broad classes of similar uses. Group assembly uses together and, to the extent possible, permit them all in the same zones under the same standards and prohibit all of them from the same zones. Regulating for broad classes may also help municipalities to establish the neutrality and general applicability of their respective codes, to show that they do not impermissibly target religious use.<sup>38</sup> Take a hard look at the zoning code to determine which uses arguably can be considered “assembly uses,” because assembly uses may not be so obvious. In *Catholic Archbishop of Seattle*, “municipal” uses were deemed assembly uses. If unsure about whether a secular use could be considered an assembly use, err on the side of caution, and regulate it in the same manner as the rest of the grouped assembly uses.

Still, there may be justifiable reasons why a municipality does not want to regulate so

broadly, and that may be acceptable if it is carefully articulated. In such instances, the municipality should be mindful of the court’s decision in *Catholic Archbishop of Seattle*, which found that any justifications for unequal treatment must be in the applicable sections of the zoning code itself to avoid the claims of subjectivity.<sup>39</sup> Parking space and traffic control, generation of municipal revenue, limiting a commercial zone to commercial use, and “providing ample and convenient shopping for residents, [which] can be promoted by setting aside some land for commercial uses only, which generate tax revenues,” are examples of justifications that have been or could be used to defeat equal terms claims.<sup>40</sup> Bottom line—if excluding religious uses only, identify with specificity and explain in the zoning code itself the specific interests the municipality seeks to advance.

Municipalities should also take heed—if they “create what purports to be a pure commercial district and then allow other uses, a church would have an easy victory if the municipality kept it out.”<sup>41</sup> This is what happened in a “reverse urban blight” case in the Ninth Circuit, where the City of Yuma, Arizona sought to create an entertainment district.<sup>42</sup> The City allowed religious organizations as a conditional use in the entertainment district because a state statute prohibited bars, nightclubs, and liquor stores—common “entertainment” uses—within 300 feet of churches.<sup>43</sup> The Ninth Circuit rejected the City’s justification for the unequal treatment (promoting the development of the entertainment district) because “many of the uses permitted as of right would have the same practical effect as a church of blighting a potential block of bars and nightclubs.”<sup>44</sup> The court noted that “[a]n apartment building taking up the whole block may be developed as of right, and so may a post office or prison. Prisons have bars, but not the kind promoting ‘entertainment.’”<sup>45</sup> When identifying potential justifications, think long

and hard about what other uses are allowed and whether they could cause the same impacts sought to be alleviated by subjecting religious uses to different standards. If allowed uses cause the same or similar impacts as religious uses excluded from the zone, the municipality may have an equal terms problem.

## VI. Be Careful What You Say

“It’s stupid to say bad things about your neighbors. If you are sensible, you will keep quiet. . . . A city without wise leaders will end up in ruin . . . .”<sup>46</sup> We all make mistakes. And fortunately, many of our transgressions are forgiven. Sometimes, however, the Rule of Law will not permit certain behavior to be disregarded. One of the first things considered by courts reviewing RLUIPA claims is whether there is evidence of discrimination against a religious land use applicant. RLUIPA plainly states, “[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”<sup>47</sup> Discriminatory comments made by government officials or government consultants reviewing a religious group’s land use proposal, especially when made on public record, can be particularly damaging to municipalities defending against these claims. Even if a comment was made in jest, it is important to remember that words may appear very different on paper than they sound when spoken. It really comes down to common sense. Unfortunately for some, common sense is lacking. Lawyers can and will construe these comments as examples of overt discrimination. In *Fortress Bible Church v. Feiner*, the court found the Town of Greenburgh’s “open hostility”—including agency members’ comments that they opposed the application because it was “another church” and the agency’s instruction to the town planner to “stop” and “kill” the project—supported a violation of the substantial burden provision.<sup>48</sup>

Even lawyers may say things that are not carefully considered or subject to be misconstrued. In *Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic District Commission*,<sup>49</sup> the lawyer for the local historic district commission, apparently wishing to emphasize that the religious use should be treated like any secular use, said that the Jewish Orthodox group’s plans should be “reviewed as if it were a strip joint.”<sup>50</sup> He might have used the example of the VFW or private club, but he didn’t, and this one line followed him and his client to court.

There are steps that can be taken to attempt to cure the damage caused by comments that might be used as evidence of discrimination. Agency members should immediately and publicly renounce on the record any comments that can arguably be construed as discriminatory, and should be clear that the applicant’s religious beliefs play no part in their review of the application. Some courts consider whether an agency’s decision was arbitrary and capricious when evaluating RLUIPA claims.<sup>51</sup> Discriminatory comments made by public officials could in some cases support a finding that an agency’s decision was arbitrary and capricious. If a discriminatory comment is made, the agency’s chair may be well-advised to request that the offending member recuse him or herself from further review of the application, note on the record that the reason for the recusal is due to the discriminatory comments of the agency member, and, again, affirm that religion plays no part in its review. Even if the meaning of a statement is unclear, but could be construed in an unfavorable light, the record should be clarified. It may also be worthwhile to ask how the applicant would like to proceed. If it makes a suggestion (such as a resolution condemning the statement) and the agency acts on it, the applicant may have waived any opportunity to challenge the comments. While it is difficult to predict whether this would be enough to “cleanse” the

record, as each case is highly fact specific, it would, at the very least, go a long way to show good faith efforts on the part of the municipality.

## VII. Avoid an Atmosphere of Hostility

Just as public officials need to watch what they say to avoid having their comments construed as discriminatory, they also need to be cognizant of discriminatory comments made by members of the public, lest agency members will be found complicit in, or, worse, persuaded by such comments. This is what happened in *City of Cleburne v. Cleburne Living Center*.<sup>52</sup> There, the city denied a special permit for a group home for the persons with developmental disabilities due to residents' prejudices against those individuals. The city's deference to the negative attitudes and unsupported fears of these opponents supported a finding of discrimination under the Equal Protection Clause.<sup>53</sup> Although not a religious land use case, the same principle applies—there is no place for discrimination. As the court in *Cleburne* noted with approval: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>54</sup>

There are several ways in which public officials can prevent the public from making discriminatory comments. Prepare a statement to be read at the opening of the public hearing to let the public know that the religious land use applicant may choose to submit evidence about its religion—particularly regarding what its beliefs require and the space needed to accommodate its exercise of religion. The chair of the reviewing agency may also inform members of the public that they should not challenge the applicant's religious beliefs, even if they disagree whether the proposed use is religious, and to limit their comments to zoning issues, not religion. In the event discriminatory comments are made, the local officials reviewing the application should immediately

instruct the speaker to limit their comments to zoning issues, renounce such comments and, again, state on the record that religion plays no part in their review.

Sometimes incendiary and discriminatory comments are made by the public outside of the hearing itself. In response to a proposal by a Muslim group to construct a 27,000 square-foot mosque and multi-purpose hall on a 1.5 acre parcel of land located in a residential neighborhood, some took to the blogs and the comments sections of local media to voice their opinions. Among the discriminatory comments were—"Mosques are weapons bunkers, terrorist training centers, and places of incitement;"<sup>55</sup> "Yay, just what the USA needs, another house where they teach to kill those that disagree with their ideology;" and "Why don't the locals just defile the ground with pork products."<sup>56</sup> Such comments by the public outside the hearing, although irrelevant as to governmental liability, could taint the public debate. Of course, all right-thinking people find them reprehensible. Although such comments are not part of the record of the hearing, local officials who are aware of them should denounce them in a public forum to help avoid an atmosphere of hostility.

## VIII. Educate Government Officials

Absolutely essential to avoiding and defending against RLUIPA claims is proper training of local officials before they begin to review a religious use application. RLUIPA is not easily understood. Even the courts across the country are split in their interpretation several provisions of the statute. Unfortunately, some local officials may not have even heard of RLUIPA until the review process has already begun. Educating local officials during the review process itself is not ideal and could focus too much attention on the statute instead of the proposed use. This can, and should, be avoided by providing education sessions in advance of any application.

As noted, one factor some courts consider is whether a land use agency's decision was arbitrary and capricious or supported by substantial evidence in the record. This is particularly relevant to substantial burden claims. A finding that a decision was arbitrary and capricious weighs in favor of finding a RLUIPA violation.<sup>57</sup> In *Grace Church of North County v. City of San Diego*, the court found a violation of the substantial burden provision based in part on: (a) the fact that the planning board members "lacked legal training and possessed little to no knowledge of RLUIPA;" (b) there was "no attempt by the City to educate the [planning board] regarding RLUIPA;" and (c) "[t]o the extent members of the RBPB were even aware of RLUIPA's existence, the evidence indicates that their understanding of the law was flawed."<sup>58</sup>

To avoid a similar outcome, it may be wise to educate local officials about RLUIPA compliance. Educate now; don't wait for an application. At the very least, when a municipality learns that it will be receiving an application for a proposed religious land use, or after it receives such an application but before it opens the public hearing on same, should have its counsel offer "refresher" training tailored to the issue relevant to the specific proposal. If town counsel is involved in the review of the application to assist the agency members, it may be most effective for training to come from an outside source. Remember, non-privileged actions and statements from town counsel (a municipal agent) will be part of the record if an RLUIPA claim is ever litigated. Provide annual courses to update members on new developments in the law. Update zoning handbooks. For municipalities without such handbooks, copies of the United States Department of Justice's RLUIPA reports are available for free download on the internet.<sup>59</sup> Make it mandatory for your officials to take this training and give "pop quizzes" based on their review of the handbook or other

materials. Check out [www.RLUIPA-Defense.com](http://www.RLUIPA-Defense.com), a blog focusing on defense, but reporting on all recent developments.

As another preventive measure, the city attorney or special counsel should be present at all meetings or hearings considering religious land use proposals. Remember, some of the factors under RLUIPA may conflict with certain aspects of the normal, discretionary review process. For example, while financial hardship generally cannot form the basis for variance relief, a religious applicant's financial situation is relevant to substantial burden claims.<sup>60</sup> Also, consideration of the applicant's ability to find "ready alternatives" may not be relevant to most other types of applications, with the exception of other uses that have First Amendment protection, such as adult entertainment. If an agency member makes a comment that is clearly inconsistent with RLUIPA (for example, that the agency cannot consider the availability of alternative sites when deciding a special permit application), it may be necessary for the city attorney to step in and provide some real-time counsel to avoid a potential arbitrary and capricious decision as was made by the agency in *City of San Diego*.

Finally, as an exercise, municipalities might try "gaming" their regulations to find the weak spots by enlisting staff and public officials to take on roles as potential applicants and make hypothetical applications. Script the applications and build in as many "teaching points" as possible. Assign roles to some participants but not others. Perhaps develop a scenario regarding an application for a house of worship with a private, religious school in a residential neighborhood. Add more complexities to the example: (a) the religious group seeking the mixed use uses hallucinogenic tea as part of its faith; (b) part of the school is used for only religious classes and the other part for only secular classes; and (c) within the past few years, the agency has approved both secu-

lar and religious high schools in the same zone of varying sizes. Must it treat this application the same? Don't forget to include hypothetical agency members with conflicts of interest, questionable comments, and the usual angry neighbors. After all is said and done, bring in the experts, identify the issues, and critique the agency's decision and its handling of the public hearing.

## IX. If Denying, Encourage Re-Application

Encouraging the possibility of modifications to a religious use and suggesting that the applicant resubmit its proposal can increase a municipality's chances of defeating a substantial burden claim.<sup>61</sup> 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.<sup>62</sup> To better defend against such a claim, a municipality may wish to express on the record a genuine willingness to receive a modified application for a similar proposal. In *Fortress Bible*, the court rejected the Town of Greenburgh's claim that it left open the possibility of modification. The court found the Town's stated willingness to consider a future application was not genuine, since there was "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."<sup>63</sup>

An honest effort to develop alternatives may be the best approach for municipalities to avoid an RLUIPA violation and protracted, costly litigation. Be careful to note that while the agency may be more receptive to a modified proposal that incorporates the specific recommendations of the reviewing agency, approval is not guaranteed. Having the applicant and the municipality jointly engage a mediator may make sense in some cases. For those municipalities that do not wish to encourage

reapplication, identifying compelling interests advanced in the least restrictive means possible will be key to defeating the claim.

## X. Ripeness

RLUIPA claims must be "ripe" to be adjudicated by a court. The most common test to determine ripeness was established by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, which requires that an applicant obtain a final, definitive position about how it can use its property, including exhaustion of the variance process.<sup>64</sup> Under this test, courts have dismissed RLUIPA suits for lack of ripeness where no variance relief was sought.<sup>65</sup> Another test to determine ripeness—and one that must be considered before the *Williamson County* test—is the "relaxed" ripeness test. Under the relaxed test, a court will adjudicate RLUIPA claims (even if no variance has been sought) if the religious entity (1) suffered immediate injury from the government's actions, and (2) additional administrative remedies would not further define the alleged injuries.<sup>66</sup> One court has concluded that a property owner's failure to appeal a cease and desist order to a local zoning board of appeals left the owner's asserted immediate injuries "ill-defined."<sup>67</sup> In view of this, municipalities may wish to consider establishing an administrative procedure to allow an aggrieved religious land use applicant to appeal an adverse zoning decision to the zoning board of appeals or another agency, or to have a formal process of reconsideration, especially one that is required as a step precedent to a further administrative appeal. This could place municipalities in a position to establish that an alleged immediate injury is ill-defined absent an appeal of an adverse decision, and prompt the court to dismiss the lawsuit, especially where a variance or other relief has not been sought.

Although the religious group may, eventually, sue again, dismissing its claims in the

first instance has some advantages for municipalities. They will have had the opportunity to see the claims in the first challenge and will know what they may be up against the next time around. Another round of local review will allow municipalities to carefully tailor their decisions to specifically address the claims raised by the religious group in its complaint. For example, if the group alleged that its application should be approved because the municipality approved similar secular assembly uses, the municipality can study those other approved uses and distinguish them from the proposed religious uses.<sup>68</sup> Municipalities will also have another chance to identify compelling interests and apply the regulations in the least restrictive means possible.

## XI. Assume the Proposed Use is Religious

RLUIPA defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>69</sup> The statute applies to “[t]he use, building, or conversion of real property for the purpose of religious exercise . . . .”<sup>70</sup> The statute’s reach is broad. RLUIPA will apply to just about any type of use alleged by an applicant as a form of religious exercise—even if non-traditional—so long as the beliefs are “sincerely held.”<sup>71</sup> Courts are not in the business of deciding what is and is not religious exercise.<sup>72</sup> While municipalities are free to challenge the sincerity of religious beliefs, they should not opine on what they view and do not view as religious exercise. Challenging whether an applicant’s proposed use is a form of religious exercise could also raise a red flag of discrimination.

In the wake of the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>73</sup> some have questioned whether privately held corporations can now bring RLUIPA claims.<sup>74</sup>

*Hobby Lobby* found that such corporations

were “persons” and could sue under RLUIPA’s sister statute, the Religious Freedom Restoration Act. Justice Ginsburg stated in her dissent: “To permit commercial enterprises to challenge zoning and other land-use regulations under RLUIPA would ‘dramatically expand the statute’s reach’ and deeply intrude on local prerogatives, contrary to Congress’ intent.”<sup>75</sup> What should municipalities do if a privately held corporation asserts that it is protected by RLUIPA? Consider, for example, the frozen yogurt establishment sweetFrog.<sup>TM</sup> According to the company’s website, sweetFrog premium frozen yogurt strives to “create the best frozen yogurt experience you’ve ever had!”<sup>76</sup> It adds that “[t]he F.R.O.G. in sweetFrog stands for Fully Rely On God.”<sup>77</sup> What happens if sweetFrog seeks zoning approval to operate at a certain location it asserts is of religious significance? Does RLUIPA apply? Out of an abundance of caution, municipalities may now wish to proceed as though the statute does apply.

## XII Conclusion

One of the greatest misconceptions of municipalities is that they must submit to the demands of religious land use applicants simply because RLUIPA exists. With proper planning and preparation, however, municipalities can avoid these claims. When subjected to a lawsuit, municipalities should first decide whether they wish to vigorously defend their actions or, if possible, negotiate a mutually satisfactory compromise with the religious group, because legal fees in these cases can mount quickly. Although interpretation of the law varies in different parts of the country, and is altogether unclear in some parts, a successful defense is possible.

### ENDNOTES:

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<sup>1</sup>*Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 963 (N.D. Ill. 2003) (Pallmeyer, J.).

<sup>2</sup>E.g. Nancy Chapman, National Expert: Settlement Between Al Madany and Norwalk is ‘Remarkable’; Nancy on Norwalk, <http://www.nancyonnorwalk.com/2014/08/national-expert-settlement-between-al-madany-and-norwalk-is-remarkable/> (August 23, 2014).

<sup>3</sup>Sun Tzu, *Art of War*.

<sup>4</sup>*Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003); see 146 Cong. Rec. S7776 (“This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.”).

<sup>5</sup>*Alger Bible Baptist Church v. Township of Moffatt*, 2014 WL 462354, at \*6 (E.D. MI Feb. 5, 2014) (Ludington, J.) (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 652 (10th Cir. 2006)).

<sup>6</sup>42 U.S.C.A. § 2000cc(3)(B).

<sup>7</sup>*City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 744, 115 S. Ct. 1776, 131 L. Ed. 2d 801, 9 A.D.D. 402 (1995).

<sup>8</sup>*Leshar Communications, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 540, 277 Cal. Rptr. 1, 802 P.2d 317 (1990).

<sup>9</sup>*Eagle Cove Camp & Conference Center, Inc. v. Town of Woodboro, Wis.*, 734 F.3d 673, 678, 682 (7th Cir. 2013), cert. denied, 134 S. Ct. 2160, 188 L. Ed. 2d 1126 (2014).

<sup>10</sup>*Eagle Cove Camp & Conference Center, Inc. v. Town of Woodboro, Wis.*, 734 F.3d 673, 682 (7th Cir. 2013), cert. denied, 134 S. Ct. 2160, 188 L. Ed. 2d 1126 (2014).

<sup>11</sup>*Eagle Cove Camp & Conference Center, Inc. v. Town of Woodboro, Wis.*, 734 F.3d 673, 682 (7th Cir. 2013), cert. denied, 134 S. Ct. 2160, 188 L. Ed. 2d 1126 (2014).

<sup>12</sup>*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct.

2217, 124 L. Ed. 2d 472 (1993) (citation omitted).

<sup>13</sup>*Murphy v. Zoning Com’n of Town of New Milford*, 289 F. Supp. 2d 87, 108 (D. Conn. 2003) (Fitzsimmons, J.), reversed on other grounds, 402 F.3d 342 (2d Cir. 2005);

<sup>14</sup>*Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 152, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969).

<sup>15</sup>*Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

<sup>16</sup>Dwight Merriam, *One (1) Ounce of RLUIPA Prevention*, Municipal Lawyer, 37 (May/June 2008).

<sup>17</sup>42 U.S.C.A. § 2000cc(a)(1).

<sup>18</sup>*Adhi Parasakthi Charitable, Medical, Educational, and Cultural Society of North America v. Township of West Pikeland*, 721 F. Supp. 2d 361, 378 (E.D. Pa. 2010) (Joyner, J.).

<sup>19</sup>*Castle Hills First Baptist Church v. City of Castle Hills*, 2004 U.S. Dist. LEXIS 4669, at \*59 (W.D. TX Mar. 17, 2004) (Ferguson, J.).

<sup>20</sup>*Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic Dist. Com’n*, 768 F.3d 183, 195 (2d Cir. 2014); *International Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007). Other courts have concluded the opposite: “the harsh realit[ies] of the marketplace [that] sometimes dictate that certain facilities are not available to those who desire them.” *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003); see *Andon, LLC v. Reconciling People Together in Faith Ministries, LLC*, No. 4:14-cv-76 (E.D. Va. Nov. 20, 2014) (“the costs incurred by the Congregation’s delay and uncertainty in locating a worship space can be attributed simply to the difficulties associated with finding an affordable property in an urban market.”).

<sup>21</sup>*Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 352-53, 226 Ed. Law Rep. 595 (2d Cir. 2007).

<sup>22</sup>*Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 352, 226 Ed. Law Rep. 595 (2d Cir. 2007).

<sup>23</sup>42 U.S.C.A. § 2000cc(3)(a).

<sup>24</sup>*Vision Church v. Village of Long Grove*, 468 F.3d 975, 989-90 (7th Cir. 2006).

<sup>25</sup>*Castle Hills First Baptist Church v. City*

of Castle Hills, 2004 U.S. Dist. LEXIS 4669, at \*48 (W.D. TX Mar. 17, 2004) (Ferguson, J.); *Braunfeld v. Brown*, 366 U.S. 599, 607, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), for additional opinion, see, 366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 (1961).

<sup>26</sup>*Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

<sup>27</sup>*Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004).

<sup>28</sup>United States Department of Justice Civil Rights Division, A Guide To Federal Religious Land Use Protections, [http://www.justice.gov/crt/spec\\_topics/religiousdiscrimination/rluipa\\_guide.pdf](http://www.justice.gov/crt/spec_topics/religiousdiscrimination/rluipa_guide.pdf) (last accessed November 25, 2014); 42 U.S.C.A. § 2000cc-2(f).

<sup>29</sup>United States Department of Justice Civil Rights Division, Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), at ¶ 16, [http://www.justice.gov/crt/rluipa\\_q\\_a\\_9-22-10.pdf](http://www.justice.gov/crt/rluipa_q_a_9-22-10.pdf) (September 22, 2010).

<sup>30</sup>42 U.S.C.A. § 2000cc-3(e). RLUIPA's safe harbor provision provides:

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden. *Id.*

<sup>31</sup>42 U.S.C.A. § 2000cc(b)(1).

<sup>32</sup>*Elijah Group, Inc. v. City of Leon Valley, Tex.*, 643 F.3d 419, 422-23 (5th Cir. 2011) (noting different tests).

<sup>33</sup>*E.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231-32 (11th Cir. 2004).

<sup>34</sup>*Corp. of the Catholic Archbishop of Seattle v. City of Seattle*, 2014 WL 2807684 (W.D. Wash. 2014) (Zilly, J.).

<sup>35</sup>*Corp. of the Catholic Archbishop v. City of Seattle*, 2014 WL 2807684, at \*1 (W.D. WA June 20, 2014) (Zilly, J.).

<sup>36</sup>*Corp. of the Catholic Archbishop v. City of Seattle*, 2014 WL 2807684, at \*4 (W.D. WA June 20, 2014) (Zilly, J.).

<sup>37</sup>*Corp. of the Catholic Archbishop v. City of Seattle*, 2014 WL 2807684, at \*4 (W.D. WA June 20, 2014) (Zilly, J.).

<sup>38</sup>*Church of the Lukumi Babalu Aye, Inc. v.*

*City of Hialeah*, 508 U.S. 520, 531-34, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

<sup>39</sup>*Corp. of the Catholic Archbishop v. City of Seattle*, 2014 WL 2807684, at \*4 (W.D. WA June 20, 2014) (Zilly, J.).

<sup>40</sup>*River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 373 (7th Cir. 2010).

<sup>41</sup>*River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 374 (7th Cir. 2010).

<sup>42</sup>*Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1165 (9th Cir. 2011).

<sup>43</sup>*Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1166 (9th Cir. 2011).

<sup>44</sup>*Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1174-75 (9th Cir. 2011).

<sup>45</sup>*Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1175 (9th Cir. 2011).

<sup>46</sup>Proverbs 11:12 and 11:14.

<sup>47</sup>42 U.S.C.A. § 2000cc(b)(2).

<sup>48</sup>*Fortress Bible Church v. Feiner*, 694 F.3d 208, 214, 219-20 (2d Cir. 2012).

<sup>49</sup>*Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic Dist. Com'n*, 768 F.3d 183 (2d Cir. 2014).

<sup>50</sup>*Chabad Shul Too Revolutionary, Says Connecticut Town, THE JERUSALEM POST*, <http://www.jpost.com/Jewish-World/Jewish-News/Chabad-shul-too-revolutionary-says-Connecticut-town> (September 19, 2010). At a meeting to consider the Chabad group's proposal, the chairwoman of the Historic District Commission objected to the proposed use of a Star of David on the synagogue and stated that it "may not comply with the [historic] district." *Id.* Thereafter, she was depicted on a local website wearing a Nazi uniform. She later recused herself from further review of the Chabad group's proposal. *Id.*

<sup>51</sup>*E.g., Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 351, 226 Ed. Law Rep. 595 (2d Cir. 2007).

<sup>52</sup>*City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

<sup>53</sup>*City of Cleburne, Tex. v. Cleburne Living*

Center, 473 U.S. 432, 448, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

<sup>54</sup>Id. at 448; see *Open Homes Fellowship, Inc. v. Orange County, Fla.*, 325 F. Supp. 2d 1349, 1360 (M.D. Fla. 2004) (finding equal protection violation where “the County improperly deferred to the objections of a fraction of the body politic and illegally gave these biases effect.”).

<sup>55</sup>Robert Koch, Al-Madany Center of Norwalk Files Lawsuit Appealing Zoning Commission Ruling, *The Hour* (June 28, 2012).

<sup>56</sup>Dwight Merriam and Evan Seeman, Can the Public’s Discriminatory Comments Play a Role in RLUIPA Claims?, RLUIPA Defense Blog, <http://rluipa-defense.com/article.cfm?ID=209> (September 11, 2012).

<sup>57</sup>*Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 352, 226 Ed. Law Rep. 595 (2d Cir. 2007).

<sup>58</sup>*Grace Church of North County v. City of San Diego*, 555 F. Supp. 2d 1126, 1175 (S.D. Cal. 2008) (Huff, J.).

<sup>59</sup>United States Department of Justice Civil Rights Division, Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), [http://www.justice.gov/crt/rluipa\\_\\_q\\_\\_a\\_\\_9-22-10.pdf](http://www.justice.gov/crt/rluipa__q__a__9-22-10.pdf) (September 22, 2010); United States Department of Justice Civil Rights Division, Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act, [http://www.justice.gov/crt/rluipa\\_\\_report\\_\\_092210.pdf](http://www.justice.gov/crt/rluipa__report__092210.pdf) (September 22, 2010); United States Department of Justice Civil Rights Division, A Guide To Federal Religious Land Use Protections, [http://www.justice.gov/crt/spec\\_\\_topics/religiousdiscrimination/rluipa\\_\\_guide.pdf](http://www.justice.gov/crt/spec__topics/religiousdiscrimination/rluipa__guide.pdf) (last accessed November 25, 2014).

<sup>60</sup>*Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 352, 226 Ed. Law Rep. 595 (2d Cir. 2007).

<sup>61</sup>*Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012).

<sup>62</sup>*Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012).

<sup>63</sup>*Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012).

<sup>64</sup>*Planning Com’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); but see *Roman Catholic Bishop of Springfield v. City of Springfield*,

*Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 89-92 (1st Cir. 2013) (applying Article III ripeness principles).

<sup>65</sup>E.g., *Murphy v. New Milford Zoning Com’n*, 402 F.3d 342, 353-54 (2d Cir. 2005) (citation omitted).

<sup>66</sup>*Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002); *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 979 (9th Cir. 2011), cert. denied, 133 S. Ct. 423, 184 L. Ed. 2d 255 (2012).

<sup>67</sup>*Murphy v. New Milford Zoning Com’n*, 402 F.3d 342, 352 (2d Cir. 2005) (citation omitted).

<sup>68</sup>A religious group may assert facial and as-applied challenges under the equal terms provisions. A facial challenge is limited to the text of the zoning code and compares the code’s treatment of religious uses to secular assembly uses. An as-applied challenge compares the municipality’s treatment of the proposed religious use to other assembly uses located in its jurisdiction.

<sup>69</sup>42 U.S.C.A. § 2000cc-5(7)(A).

<sup>70</sup>42 U.S.C.A. § 2000cc-5(7)(B).

<sup>71</sup>*Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 700 (E.D. Mich. 2004) (Borman, J.). For an interesting discussion of members of a fraternity seeking to circumvent local zoning regulations by moving into a house and filing to incorporate as a nonprofit religious organization called the “Apostles of Peace and Unity,” see Michelle Boorstein, ‘Apostles’ Ordered to Abide by Zoning Laws, *THE WASHINGTON POST*, B04 (November 23, 2006).

<sup>72</sup>*U.S. v. Ballard*, 322 U.S. 78, 86-87 64 S. Ct. 882, 88 L. Ed. 1148 (1944).

<sup>73</sup>*Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

<sup>74</sup>Stephen R. Miller, Hobby Lobby’s “passing strange” interpretation of RLUIPA: an unlikely, but potentially dramatic impact on land use law?, *Land Use Prof Blog*, [http://lawprofessors.typepad.com/land\\_\\_use/2014/07/hobby-lobbys-passing-strange-interpretation-of-rluipa-and-the-cases-unlikely-but-potentially-chill.html](http://lawprofessors.typepad.com/land__use/2014/07/hobby-lobbys-passing-strange-interpretation-of-rluipa-and-the-cases-unlikely-but-potentially-chill.html) (July 1, 2014).

<sup>75</sup>*Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 189 L. Ed. 2d 675 (2014) (Ginsburg, J., dissenting).

<sup>76</sup>See <http://sweetfroggyogurt.com/about>.

<sup>77</sup>See <http://sweetfrogyogurt.com/about>.

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