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Five Tips for Planners and Planning Commissioners Reviewing Religious Land Use Applications

by Attorneys *Evan J. Seeman* and *Brian R. Smith*, *Robinson & Cole*

Few things are more personal than private property rights and religion. Combining the two is a recipe for a volatile situation. This is especially true in religious land use disputes with applicants, opponents, and agency officials often taking hard line stances unwilling to compromise. A federal statute known as the Religious Land Use & Institutionalized Persons Act, 42 U.S.C. § 2000cc (RLUIPA), provides certain protections for religious land use applicants. Municipalities have much more to lose than just the divisive nature that these disputes have on communities. Municipalities that are found to violate RLUIPA may have to pay the legal fees of the prevailing religious land use applicant (in addition to their own fees). As fees can quickly mount in these cases, there is significant risk to municipalities — an RLUIPA loss can mean having to pay hundreds of thousands, if not millions, of dollars to the religious applicant’s lawyers. This all in addition to the damage that an RLUIPA loss can have on comprehensive plans for development (think the example of the “mega” church).

We recently experienced the force of RLUIPA in representing The St. Joseph’s Polish Roman Catholic Congregation (Church) and St. Vincent de Paul Place, Norwich, Inc. (St. Vincent) in their battle with the City of Norwich, Connecticut. St. Vincent is a ministry of the Church that provides charitable services to the poor and needy in the name of religion, including through its operation of a soup kitchen and food pantry. The controversy began in the summer of 2012 when St. Vincent’s former landlord informed it that the space it had been leasing in downtown Norwich was in need of serious renovation, and that St. Vincent would be forced to vacate the premises. With nowhere else to go and hundreds of mouths to feed, St. Vincent obtained temporary (6-month) approval from the City to operate from a building owned by the Church that had previously been used as a parochial school. The new location — about a third of a mile from the former location — was in a residential neighborhood and housed several of St. Vincent’s patrons.

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After months of debate, the Commission denied the application, finding that the effect on the neighborhood would be too great. St. Vincent and the Church sued in federal court, alleging violations of RLUIPA, the state and federal constitutions, and Conn. Gen. Stat. § 8-8.

Religious Land Use Applications *cont'd*

During the next six months, St. Vincent searched for other properties where it could potentially move, but was unsuccessful for a host of reasons. Potential sites were either too expensive or too far removed from the population that St. Vincent serves. We assisted St. Vincent in applying for a special permit to continue to operate from the former school building. The public hearing was emotionally charged with much at stake for St. Vincent — an unfavorable decision would force it to close its doors since it had nowhere else to go. The City was faced with a difficult decision. On the one hand, St. Vincent sought to exercise freely its religion. Clergy members addressed Norwich's Commission on the City Plan to explain the religious nature of St. Vincent's activities. St. Vincent patrons who rely on the services described the need for the soup kitchen, giving personal accounts of the importance of the kitchen to their lives. On the other hand, there was fierce opposition from neighborhood residents

who raised a host of NIMBY concerns in an effort to force St. Vincent to relocate.

After months of debate, the Commission denied the application, finding that the effect on the neighborhood would be too great. St. Vincent and the Church sued in federal court, alleging violations of RLUIPA, the state and federal constitutions, and Conn. Gen. Stat. § 8-8. They filed two more federal suits after the City's Zoning Board of Appeals (ZBA) upheld notices of violation and denied St. Vincent's and the Church's application for a use variance to operate from the school building. These local hearings were fraught with even more emotion than the special permit review, with accusations of the ZBA members pre-determining the outcome, various assertions of bad behavior all around, and some members of the public and the ZBA either believing the application was for a homeless shelter or would lead to one.

To the City's credit, it retained special counsel who (after three years of litigation) helped it to negotiate a settlement

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Religious Land Use Applications *cont'd*

with St. Vincent and the Church that will allow St. Vincent to continue to remain at the Church property. As was apparent during the public hearing sessions in Norwich, some agency members had difficulty understanding RLUIPA's scope and application. This federal statute was enacted by Congress in 2000, so it is still relatively new and its interpretation is continually evolving. Adding to the confusion in Norwich was the courts' inconsistent application of RLUIPA and the agency members' lack of training under the statute before the controversy began. Important lessons were learned by all that we hope will help other planners and planning commissioners across the state in reviewing religious land use applications.

1) If the Applicant Says the Use is Religious, Treat it as Such

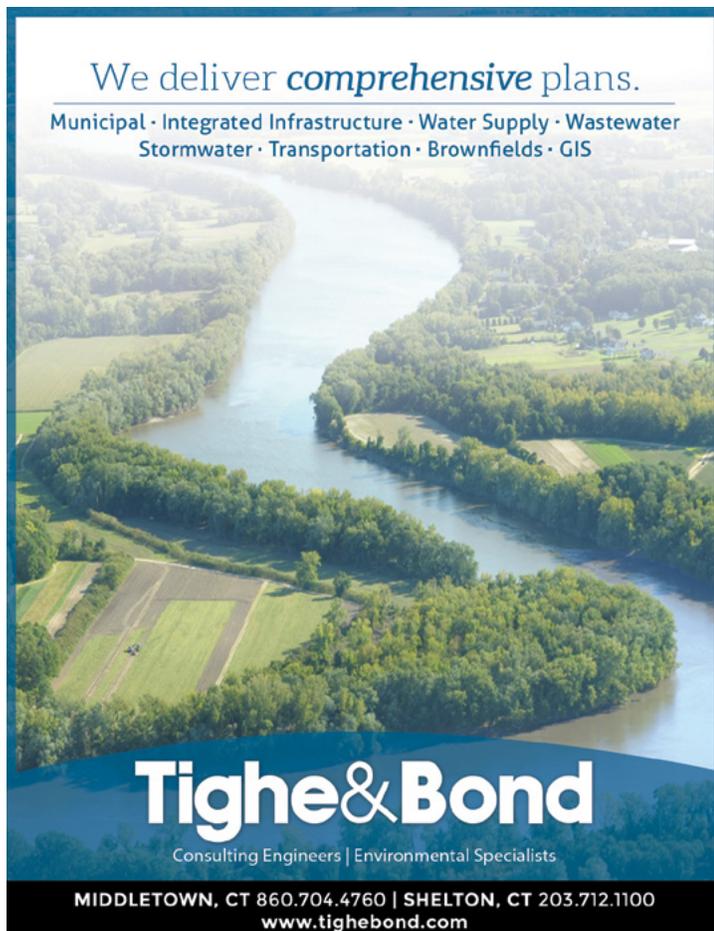
A major issue in the St. Vincent controversy at the agency level was whether the services were in fact "religious" to invoke RLUIPA. Undoubtedly, the services

provided by St. Vincent often qualify as secular, charitable uses. Under RLUIPA, however, even uses that appear secular are in most instances religious if the applicant says they are. Courts have long held that they are not in the business of deciding which uses are and are not religious. If a religious group asserts that a use is religious, the group must be taken at its word. Recently, in *Harbor Missionary Church Corporation v. City of San Buenaventura* (9th Cir. 2016), the Ninth Circuit ruled that providing meals, shelter, clothing and other charitable services to those in need was activity protected by RLUIPA.

Only when it appears that a religious belief is not "sincerely held" may agencies find a use to be secular. That is, if a religious group claims its use is religious simply to circumvent zoning code requirements, the statute will not apply. Exercise caution in concluding that a religious belief is not "sincerely held," because the vast majority of beliefs have been found to be sincerely held. Failure to recognize a

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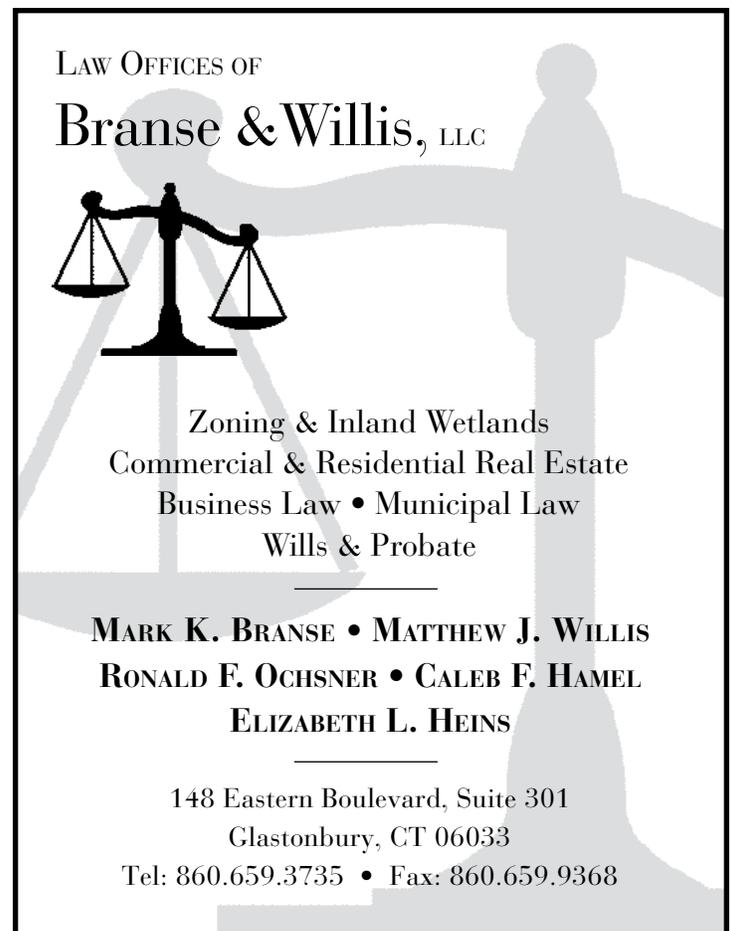
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Religious Land Use Applications cont'd

claimed use as one of religious belief could be used to support a RLUIPA violation.

2) Be Prepared for Unordinary Zoning Considerations

There are several factors that come into play when considering religious land use applications that go beyond the scope of typical zoning considerations. In the case of St. Vincent, we argued that because there were no alternative sites that the soup kitchen could afford to purchase, a complete denial of the use variance application would impose a substantial burden on its religious exercise in violation of the statute. Some agency members, however, stated that they could not consider the availability of alternative sites or the applicant's financial situation. While this is usually true for your run of the mill variance application, such considerations do come into play for religious land use applicants. Also relevant is an agency's treatment of applications for similarly situated secular assembly uses. Generally, an agency's approval of another application has no precedent. But under RLUIPA, local governments must treat religious uses on equal terms with comparable secular uses, so how an agency processes an application for a similar secular use is fair game.

3) Evaluate Reasonable Accommodations

RLUIPA's substantial burden provision provides that no local government shall substantially burden religious exercise unless it has a compelling interest to do so and does so in the "least restrictive means" possible. While the least restrictive means language is confusing, it typically requires that agencies reviewing religious proposals examine whether the

use could be approved subject to reasonable conditions or on some lesser scale. The Second Circuit, in *Westchester Day School v. Village of Mamaroneck* (2d Cir. 2007), ruled that a zoning agency's flat denial of an application for a special permit — without even considering whether agency concerns could be ameliorated by imposing conditions — did not satisfy the least restrictive means requirement. In Norwich, neither the Commission on the City Plan nor the ZBA in reviewing the special permit and use variance applications began to consider conditions for approval, and outright rejected the special permit and use variance applications, despite St. Vincent's insistence that it was open to possible conditions. To be clear, it is not simply giving lip service to possible conditions that satisfies this requirement — an agency must undertake a thoughtful analysis of how to address its concerns and whether approval with conditions may accomplish a satisfactory result. If an agency evaluates possible conditions, but still denies an application, a court may disagree with the agency's assessment or determine that other conditions that were not considered could be implemented. Sometimes, it is not always possible to approve an application even with conditions or on a lesser scale, and that may be okay, so long as it is supported by the record.

4) Create a Winning Record

Whether government action is arbitrary and capricious can be used to support an RLUIPA substantial burden claim, similar to zoning appeals taken under C.G.S. §8-8. Unlike regular zoning appeals, however, there is much at stake for governments defending against RLUIPA claims due to the risk of having to pay the religious group's legal fees. Agencies must exercise extreme caution, demonstrate on the record the reasonableness of their actions, and provide an evidentiary basis for any concerns they may have with the proposed use. If an agency member says something that could be construed as discriminatory, immediately cleanse the record by strongly rebuking the member and his or her statement. Even comments

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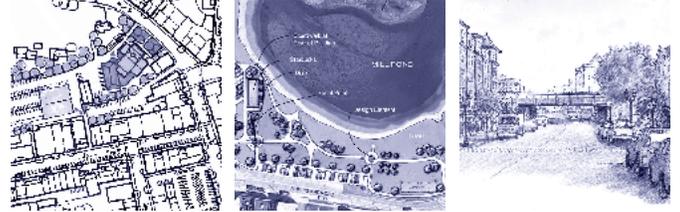
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made in jest could support a claim of discrimination, because words appear very different on paper than they sound when spoken. Discriminatory or off-hand comments could render agency action arbitrary and capricious, exposing municipalities to significant liability. This is what happened in *Fortress Bible Church v. Feiner* (2d. Cir. 2012), where the Second Circuit found a RLUIPA violation in part due to agency members who stated that they did not want “another church” and instructed the town’s planning director to “kill” the project. The Town of Greenburgh, New York paid \$6.5 to settle the case. Agency members need to understand the risk and exercise extreme caution.

5) Train Planners and Agency Members

It is critical to train planners and agency members. The RLUIPA statute is difficult to comprehend, even for the courts. Training should begin before a religious application is submitted. At the American Planning Association’s

2016 national conference in Phoenix, Arizona, over half of the 100+ planners listening to a discussion about RLUIPA indicated that they had not received RLUIPA training. This is a trend that must change. One federal court, in *Grace Church of North County v. City of San Diego* (S.D. CA 2008), found a RLUIPA violation in part because the agency members were not familiar with the statute and misapplied it.

Norwich agency members testified that they had not even heard of the statute until the zoning hearing. Getting out ahead of problems that often arise in the review of religious land use proposals through training can go a long way to avoid RLUIPA claims and, if such claims are brought, can better position a municipality to establish a successful defense. ■

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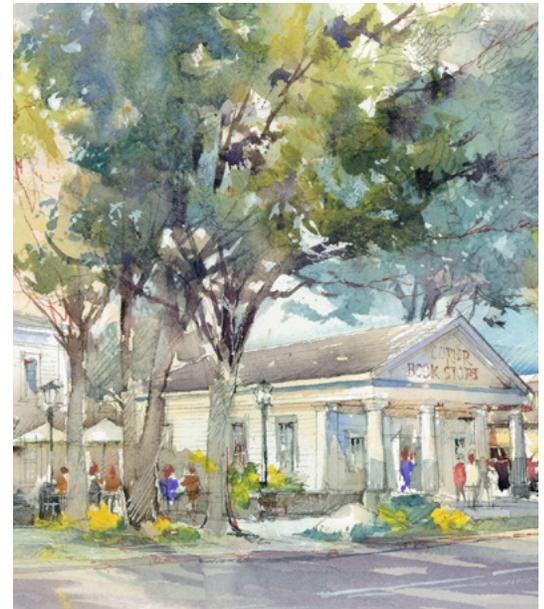


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