

Church v. State

Just pray you're not sued under the RLUIPA statute.

By Michael S. Giaimo and Dwight Merriam, FAICP

One wintry Saturday evening, a woman we'll call Martha invited a couple of friends to her house for prayer and song, followed by supper. Martha, who lives in a neighborhood of tidy single-family houses on half-acre lots, had recently joined a religious sect known as the Fellowship of the Sacred Spirit. Members gather locally for prayer meetings and are linked nationally through a website.

The next week, Martha's friends each brought a couple of their friends to the meeting. At first, neighbors took little notice. But the meetings grew larger over the next few months, and more and more cars drove down the quiet street on Saturday evenings. The neighbors began to wonder what was going on during those three-hour worship services.

When the weather warmed and windows were opened up and down the street, the neighbors could hear exuberant singing, accompanied by an amplified electric keyboard. Not everyone liked the music.

Within six months, regular attendance had expanded to 40 to 50 people, and the services had spilled over onto Martha's rear deck where the hot tub was used for immersion ceremonies to welcome new members. To her neighbors' further dismay, Martha had erected a 30-foot-high wood arch, painted bright blue, on her front lawn. The arch was both a symbol of the faith and a guidepost for visitors to the services. She had also removed the front hedge to allow those who couldn't find a space on the street to park on the lawn.

Too much

For the neighbors, this was too much. Several called the city's zoning enforcement officer, who checked the regulations. The finding was clear: Churches and other places of public assembly are not allowed in this residential zone. The arch violates the height limit on accessory structures. Parking is not allowed in front yards.

The zoning officer visited Martha to explain the city's position. He noted that allowing cars to park on the street would make it difficult for a fire truck or ambulance to get through. "There are lots of places in town where you can operate a church," he concluded, "but not in this particular residential zone."

Martha responded that the group could not afford to buy or rent a space for the services. "All our money goes to feed and clothe the poor," she said. "Besides, home worship is an important tenet of our faith. Our services are over by 9 p.m., so we are not in violation of the noise ordinance.

And our neighbors' kids have parties with as many people as we have at our services, and their cars park all along the street. We're willing to work out a car-pooling plan," she concluded, "but we're not going to stop our worship services."

The zoning official responded by issuing a cease and desist order. He warned that if the services did not stop, Martha would be subject to civil and criminal penalties for violating the zoning law.

Two days later, the zoning official and the city received a surprise delivery — a federal writ pursuant to 42 U.S.C. 2000cc, enjoining them from enforcing the city's zoning ordinance against the Fellowship of the Sacred Spirit. It was their introduction to the Religious Land Use and Institutionalized Persons Act of 2000, and it felt like a kick in the shins.

A primer

RLUIPA (pronounced "Ree-Loopa") is federal zoning for religious uses, plain and simple. The provision of the statute that gets the most attention from planners is section 2000cc(A)(1), which says that, subject to some exceptions, local and state governments may not "impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution."

The statute also requires that a state or local government must not treat "a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." It prevents governments from imposing a land-use regulation that "discriminates against any assembly or institution on the basis of religion or religious denomination," and it bars a jurisdiction from totally excluding or unreasonably limiting religious assemblies, institutions, or structures within a jurisdiction.

Where did this law come from? The short answer is: from a joint effort by one of the Senate's most conservative members and one of its most liberal. The longer answer has its roots in our country's origins.

In the beginning, the free exercise clause of the Constitution's First Amendment codified one of the founding principles of the U.S. — that its residents could worship freely, without interference by government. Land-use law has always been subject to that limitation.

For some, however, the free exercise clause did not do enough to protect religious worship from regulatory constraints. They were particularly upset by the Supreme Court's decision in the 1990 case of *Employment Division, Department of Human Resources of Oregon v. Smith*. That case, known as *Smith II*, involved a free exercise claim brought by two state employees who were denied benefits after being fired for smoking peyote.

The Court held that the free exercise clause did not excuse the employees from complying with neutral and generally applicable laws. The case was seen as a retreat from the degree of protection the Court had previously given to free exercise claims.

First round

In response to *Smith II*, Congress in 1993 enacted the Religious Freedom and Restoration Act (RFRA) to curtail the effect of government regulations, including zoning and other land-use laws, that interfered with religious activity. Four years later, after several hundred lower court cases addressing and interpreting RFRA, the Supreme Court declared it unconstitutional in *City of Bourne v. Flores*. The Court determined that the law's broad scope took it beyond Congress's power to make laws protecting civil rights.

Congress jumped at the chance to start again, this time focusing on two areas: land-use laws and the rights of prisoners. Religious rights advocates had identified both as particularly subject to intrusions on religious freedom.

After hearing testimony about cases where municipalities had denied churches the right to expand and hampered worship in other ways, the House and Senate passed RLUIPA unanimously by a voice vote. The chief Senate sponsors were Edward M. Kennedy (D-Mass.) and Orrin Hatch (R-Utah), seemingly as strange legislative bedfellows as the zoning boards and prison wardens who were the law's two main targets. President Bill Clinton quickly signed it into effect in September 2000.

To date, we count more than 60 federal and state cases involving RLUIPA, including 22 federal circuit court decisions that address the act in some way. Fewer than half of the reported decisions involve land use. The remainder concern the aspects of the act addressing institutionalized persons, dealing for example with prisoners seeking to wear clothing that symbolizes their religion.

What's at stake?

Back to Martha and the fellowship. Can she stop the city from enforcing its zoning regulations? More is at stake for the city and its officials than its land-use policies and a group of riled-up neighbors.

If Martha succeeds in demonstrating that the city has violated her civil rights under RLUIPA, she will be allowed to continue the prayer meetings at her house. But she also may be able to recover her legal fees and costs. Trial fees alone could be in the \$50,000 to \$100,000 range, or even higher, depending on how much discovery takes place, how many motions are filed, and how long the trial takes. That's on top of whatever it costs the city to defend itself. Even for a large city, that's a significant hit. For a small township, such fees can be a budget buster.

Another issue is personal liability. In a recent case in Hawaii, the Ninth Circuit Federal Court of Appeals said city councilors could be liable as individuals for denying a beach access permit in violation of RLUIPA. (The permit was requested by a property owner who ran a business conducting weddings in her home and who wanted access to the public beach for ceremonies. RLUIPA was triggered because a local pastor who conducts some of the ceremonies joined as a plaintiff in the appeal.)

Finally, there's the public relations issue. The news media often play up the theme of intolerant government officials cracking down on beleaguered religious worshipers. As the Bible warns,

"Cursed is everyone who does not continue to do all things which are written in the book of the law" (Gal. 3:10).

Nationwide

Martha's case is typical of those facing local governments under RLUIPA. Here are some of the other land-use cases that have surfaced under this statute:

A California city was found to violate RLUIPA when, for economic development purposes, it undertook condemnation proceedings against property belonging to a church. The city hoped to accommodate a proposed Costco store. The case, *Cottonwood Christian Center v. Cypress Redevelopment Agency*, reportedly has been resolved with a settlement that allows both the church and Costco to proceed with their development plans.

In another California case, *San Jose Christian College v. City of Morgan Hill*, now before the Ninth Circuit Court of Appeals, a religiously affiliated college has invoked RLUIPA in an effort to force Morgan Hill, near San Jose, to rezone a parcel for a new campus. The city denied the rezoning because the site in question was planned for hospital use, and because college officials had not provided information required for state environmental review. The trial court upheld the city's decision.

In one quirky case, RLUIPA went head to head with another federal zoning law that local planners bemoan, the Telecommunications Act of 1996. A synagogue in White Plains, New York, opposed a cell tower on RLUIPA grounds because members of the congregation thought it would spoil their view. But the court ruled in *Omnipoint Communications v. City of White Plains* that the visual impact of the tower would not be a substantial burden on the congregation's religious practice.

Not all is lost

RLUIPA's scope is broad. Nearly every denial of a permit or enforcement of a land-use regulation against a religious entity can give rise to a claim under the act.

The good news is that the law's reach is not unlimited. State and local governments can prevail if they can establish the facts that show they are not in violation of RLUIPA, or if they can adjust their policies to satisfy the requirements of the statute.

Here are some strategies to use:

One strategy is to prove that the restriction in question, in the language of the law, furthers "a compelling governmental interest" and that it constitutes the "least restrictive means" of doing so.

Public health and safety concerns such as fire and flood protection, building construction, occupancy standards, and sanitation requirements are more likely to be found to be compelling governmental interests than concerns about aesthetics, noise, or tax base. In Martha's case, the

city's interest in the street parking issue could be such an issue, but only if the city can present strong evidence that the parking is a problem.

In *Murphy v. Zoning Commission of New Milford*, the case on which the Martha example is very loosely based, the court found a compelling interest in enforcing zoning regulations to protect health and safety. But the municipality faltered on the second test: whether it employed the least restrictive means to solve the problem.

The court was not convinced by the city's enforcement order limiting the number of worshippers at each service and prohibiting front yard parking, all in the name of traffic safety. Neither aspect of the order, the court found, was directed at reducing the number of cars. Moreover, banning yard parking would undercut the stated goal of limiting on-street vehicles.

Similarly, in the California Costco case mentioned above, the court held that the least restrictive means of eliminating economic blight in a distressed area would be simply to allow the property owner to build a church that would attract activity to the area.

A real burden

Another strategy is to make the plaintiff prove that the burden created by the regulation is substantial. The large body of case law dealing with the First Amendment right to free exercise of religion offers some favorable precedents. Some cases hold that enforcing local zoning, even if it blocks the plans of a religious institution, does not constitute a substantial burden so long as other sites are available.

Indirectly, at least, RLUIPA may have made it easier for plaintiffs to argue that a particular law imposes a substantial burden on religious exercise. In part that's because the law's definition of religious exercise specifically includes the use and development of property for that purpose. It's clear from RLUIPA's legislative history, however, that regulating a commercial use whose proceeds are used to support a religious institution is not what the act means by substantial burden.

A community can also set policy by means other than the type of regulation that is subject to RLUIPA. The statute defines land-use regulation as "a zoning or landmarking law ... that limits or restricts a claimant's use or development of land."

Consider the Buddhist parable of the blind men and the elephant. Each approached the animal from a different angle and reached a different conclusion as to what it was. Likewise, there may be more than one way to address a policy concern. Municipalities may have more latitude to regulate under environmental, licensing, or other authority than they do under their zoning powers.

It's possible to avoid RLUIPA's preemptive force by changing an offending policy or practice or by creating exemptions that eliminate the substantial burden. Take your example from Genesis: When Adam and Eve knew they were naked, "they sewed fig leaves together and made themselves coverings." In a case brought against the city of Chicago (*C.L.U.B. v. City of*

Chicago), a trial court dismissed a RLUIPA claim when the city changed the special permit procedures that allegedly burdened the plaintiffs' religious exercise.

Safety valve

Consider amending your zoning process to grant administrative relief to applicants who demonstrate a RLUIPA right. We are not aware of anyone who has tried this yet, but an administrative safety valve might allow you to resolve the issues locally without litigation.

Someone denied zoning approval or served with an enforcement order could request an adjudicatory hearing at which they would present their claim and the government would have an opportunity to adapt local policy. The form of relief could be a variance or conditional-use or special-use permit; the mechanics aren't important.

This approach would be analogous to the "reasonable accommodation" for disabled persons allowed by the Fair Housing Amendments Act and to the regulatory carve-outs some jurisdictions use to avoid takings claims associated with wetlands and similar restricted areas.

The best way to avoid escalating tensions is to maintain communications among neighbors, religious uses, and local officials. As one judge scolded: "Even absent a federal statute, one would expect that, before banning an ongoing private religious gathering, public officials in a free and tolerant society would enter into a dialogue with the participants" to work out a voluntary solution. In other words, remember the Golden Rule.

Pray for relief

Several constitutional challenges to RLUIPA are pending. Two federal district courts have already held the institutionalized persons aspect of the statute to be unconstitutional (although one federal appeals court has upheld it).

Municipal groups and others contend that the statute violates several constitutional provisions, notably the Commerce Clause, Spending Clause, and Enforcement Clause. The Establishment Clause is also implicated because the law provides special treatment to religion and thus may be seen as tending to establish some religious traditions contrary to the separation of church and state.

Ultimately, as with RFRA, the Supreme Court will have the final word. Consistent with its recent skepticism of federal intrusion into areas of customary state control, the Court may focus on the tradition of local land-use controls and find that RLUIPA offends constitutional principles of federalism. Even if the statute survives, the large number of cases currently pending before the courts, with more to come, ensures that the scope of RLUIPA and its application to particular fact patterns will be better defined as time goes on.

Be careful!

In the meantime, make sure that your city's planning and zoning officials and staff are aware, as the old hymn puts it, of the "many dangers, toils, and snares" associated with regulating religious land uses. First amendment, equal protection, and due process claims all have been used to overturn local religious land-use decisions. Many states have their own constitutional and statutory protections applicable to religious land use.

And don't forget that trying to shape a solution to accommodate a particular religious use may leave you open to claims by neighbors and others who argue that you have violated the establishment clause. Add RLUIPA to the existing list of ways that an unwary or reckless municipality might be smote down for trying to control land use or development by religious entities.

Given the risks and costs, sometimes it's better to settle cases and move on. But when it looks as though it's time to fight, if the land-use stakes are high enough, ask your APA chapter president to put you in touch with APA's amicus curiae committee, which may be able to help directly or refer you to others who can.

Finally, back to Martha. Will she win? The result will depend on the development of facts at trial or in pre-trial proceedings. (In other words, the devil is in the details.) The outcome is by no means certain.

As with most land-use cases that will be brought under RLUIPA, the significant issues for the court will be the extent to which the city's concerns are compelling enough to warrant government regulation, and whether reasonable restrictions can be honed to address the impacts without intruding on Martha's ability to conduct the services and the participants' ability to attend them.

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Resources

Websites: For a summary of reported RLUIPA land-use cases, see the Robinson & Cole website: www.rc.com/rluipa.cfm.

Also look at www.rluipa.com, the website of the Becket Fund for Religious Liberty, which assists churches with claims against municipalities.

Amicus committee: APA's amicus curiae committee, aided by Michael Giaimo, filed a friend-of-the-court brief in support of Morgan Hill in the case involving San Jose Christian College