

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued December 1, 2006 Decided October 17, 2007)

Docket No. 06-1464-cv

Westchester Day School,

Plaintiff-Appellee,

v.

Village of Mamaroneck, The Board of Appeals of the Village of Mamaroneck, Mauro Gabriele, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, George Mgrditchian, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, Peter Jackson, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, Barry Weprin, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, Clark Neuringer, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck and Antonio Vozza, In his official capacity as a former member of the Board of Appeals of the Village of Mamaroneck,

Defendants-Appellants,

United States of America,

Intervenor-Defendant.

Before:

CARDAMONE, and RAGGI, Circuit Judges,
and BERMAN, District Judge*.

* Hon. Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

1
2
3
4 Defendant Village of Mamaroneck appeals from a judgment of
5 the United States District Court for the Southern District of New
6 York (Conner, J.) entered March 3, 2006, ruling that the Village
7 violated the Religious Land Use and Institutionalized Persons Act
8 by denying Westchester Day School a special permit to expand its
9 facilities.

10 Affirmed.

11
12
13
14 JOEL C. HAIMS, Morrison & Foerster LLP, New York, New York (Jack
15 C. Auspitz, Morrison & Foerster LLP, New York, New York;
16 Stanley D. Bernstein, Berstein Liebhard & Lifshitz, LLP, New
17 York, New York, of counsel), for Plaintiff-Appellee.

18
19 KEVIN J. PLUNKETT, White Plains, New York (Robert Hermann, Darius
20 P. Chafizadeh, Thacher Proffitt & Wood LLP, White Plains,
21 New York; Joseph C. Messina, Lisa M. Fantino, Law Office of
22 Joseph C. Messina, Mamaroneck, New York, of counsel), for
23 Defendants-Appellants.

24
25 SARAH E. LIGHT, Assistant United States Attorney, New York, New
26 York (Michael J. Garcia, United States Attorney, Sara L.
27 Shudofsky, Assistant United States Attorney, Southern
28 District of New York, New York, New York; Wan J. Kim,
29 Assistant Attorney General, David K. Flynn, Eric W. Treene,
30 Sarah E. Harrington, U.S. Department of Justice, Civil
31 Rights Division, Appellate Section, Washington, D.C., of
32 counsel), for Intervenor-Defendant and Amicus Curiae the
33 United States of America.

34
35
36
37 Derek L. Gaubatz, Washington, D.C. (Anthony R. Picarello, Jr.,
38 Lori E. Halstead, The Becket Fund for Religious Liberty,
39 Washington, D.C., of counsel), filed a brief on behalf of
40 the Becket Fund for Religious Liberty, the Association of
41 Christian Schools International, and the Council for
42 Christian Colleges and Universities as Amici Curiae.

43
44

1 CARDAMONE, Circuit Judge:

2 The appeal before us is from a judgment entered March 3,
3 2006 in the United States District Court for the Southern
4 District of New York (Conner, J.) that ordered the defendant
5 Village of Mamaroneck to issue a permit to plaintiff Westchester
6 Day School to proceed with the expansion of its facilities. For
7 nearly 60 years Westchester Day School (plaintiff, WDS, day
8 school, or school) has been operating an Orthodox Jewish co-
9 educational day school with classes from pre-school to eighth
10 grade. Believing it needed to expand, the school submitted
11 construction plans to the Village of Mamaroneck and an
12 application for the required special permit. When the village
13 zoning board turned the application down, the present litigation
14 ensued.

15 In the district court the school argued that the zoning
16 board in denying its application for a permit violated the
17 Religious Land Use and Institutionalized Persons Act (RLUIPA or
18 Act), 42 U.S.C. § 2000cc et seq., by substantially burdening its
19 religious exercise without a compelling government interest to
20 justify its action. Following a bench trial, the district court
21 ordered the zoning board to approve the school's application,
22 agreeing that RLUIPA had been violated.

23 BACKGROUND

24 A. Westchester Day School's Property

25 Westchester Day School is located in the Orienta Point
26 neighborhood of the Village of Mamaroneck, Westchester County,

1 New York. Its facilities are situated on 25.75 acres of largely
2 undeveloped land (property) owned by Westchester Religious
3 Institute. Westchester Religious Institute allows the school and
4 other entities to use the property.

5 The school's buildings are far from typical. The original
6 structures were built in the late nineteenth century, one as a
7 summer home and another as a stable. The day school, which
8 opened in 1948, renovated the summer home and the stable to
9 create classrooms. The school constructed Wolfson Hall in the
10 1960s and in 1979 Westchester Hebrew High School, a separate
11 entity from WDS, built a two-story high school building on the
12 property. Thus, currently there are four principal buildings on
13 the property: the summer home (Estate House or Castle), the
14 stable (Carriage House), Wolfson Hall, and the high school
15 building.

16 The Mamaroneck Village Code permits private schools to
17 operate in "R-20 Districts" if the Zoning Board of Appeals of the
18 Village of Mamaroneck (ZBA or zoning board) grants them a special
19 permit. The property is in an R-20 district and WDS operates
20 subject to obtaining such a permit which must be renewed every
21 three years. Most recently the day school's permit was
22 unanimously renewed on November 2, 2000, before the dispute
23 giving rise to this litigation began. Several other schools are
24 located in the vicinity of Orienta Point, including the Liberty
25 Montessori School and Mamaroneck High School. Numerous large
26 properties border the school property, including the Orienta

1 Beach Club, the Beach Point Club, the Hampshire Country Club, and
2 several boat yards.

3 B. Westchester Day School's Aims

4 As a Jewish private school, Westchester Day School provides
5 its students with a dual curriculum in Judaic and general
6 studies. Even general studies classes are taught so that
7 religious and Judaic concepts are reinforced. In the nursery and
8 kindergarten classes no distinction exists between Judaic and
9 general studies; the dual curriculum is wholly integrated. In
10 grades first through eighth, students spend roughly half their
11 day on general subjects such as mathematics and social studies
12 and half on Judaic studies that include the Bible, the Talmud,
13 and Jewish history.

14 In an effort to provide the kind of synthesis between the
15 Judaic and general studies for which the school aims, the
16 curriculum of virtually all secular studies classes is permeated
17 with religious aspects, and the general studies faculty actively
18 collaborates with the Judaic studies faculty in arranging such a
19 Jewish-themed curriculum. For example, the General Studies
20 Curriculum Guide describes how social studies is taught in grades
21 6, 7, and 8, explaining that WDS tries "to develop an
22 understanding of humanistic, philosophical thought, the nature of
23 cause and effect in history, and the application of ethical
24 Judaic principles to history and daily life" (emphasis added).
25 The Guide further notes that "[s]tudying the history of Eretz
26 Yisrael [the land of Israel] has become an increasingly prominent

1 feature of assemblies and social studies lessons." And, the
2 Guide's Science Curriculum Map notes that in science class first
3 graders are taught about "the world around them [and] the
4 seasonal changes and connections to the Jewish holidays"
5 (emphasis added).

6 The school's physical education teachers confer daily with
7 the administration to ensure that during physical education
8 classes Jewish values are being inculcated in the students. This
9 kind of integration of Jewish and general culture is made
10 possible when a school actively and consciously designs
11 integrated curricular and extracurricular activities on behalf of
12 its student body. See Jack Bieler, Integration of Judaic and
13 General Studies in the Modern Orthodox Day School, 54:4 Jewish
14 Education 15 (1986), available at [http://www.lookstein.org/](http://www.lookstein.org/integration/bieler.htm)
15 integration/bieler.htm. Thus, the school strives to have every
16 classroom used at times for religious purposes, whether or not
17 the class is officially labeled Judaic. A Jewish day school like
18 WDS exists, at least in part, because Orthodox Jews believe it is
19 the parents' duty to teach the Torah to their children. Since
20 most Orthodox parents lack the time to fulfill this obligation
21 fully, they seek out a school like WDS.

22 C. The Expansion Project

23 By 1998 WDS believed its current facilities inadequate to
24 satisfy the school's needs. The district court's extensive
25 findings reveal the day school's existing facilities are
26 deficient and that its effectiveness in providing the education

1 Orthodox Judaism mandates has been significantly hindered as a
2 consequence. The school's enrollment has declined since 2001, a
3 trend the district court attributed in part to the zoning board's
4 actions. As a result of the deficiencies in its current
5 facilities the school engaged professional architects, land
6 planners, engineers, and an environmental consulting firm to
7 determine what new facilities were required. Based on these
8 professionals' recommendations, WDS decided to renovate Wolfson
9 Hall and the Castle and to construct a new building, Gordon Hall,
10 specifically designed to serve the existing student population.
11 The renovations would add 12 new classrooms; a learning center;
12 small-group instructional rooms; a multi-purpose room; therapy,
13 counseling, art and music rooms; and computer and science labs.
14 All of them were to be used from time to time for religious
15 education and practice.

16 In October 2001 the day school submitted to the zoning board
17 an application for modification of its special permit to enable
18 it to proceed with this \$12 million expansion project. On
19 February 7, 2002 the ZBA voted unanimously to issue a "negative
20 declaration," which constituted a finding that the project would
21 have no significant adverse environmental impact and thus that
22 consideration of the project could proceed. After the issuance
23 of the negative declaration, a small but vocal group in the
24 Mamaroneck community opposed the project. As a result of this
25 public opposition, on August 1, 2002 the ZBA voted 3-2 to rescind
26 the negative declaration. The effect of the rescission was to

1 require WDS to prepare and submit a full Environmental Impact
2 Statement.

3 D. Prior Legal Proceedings

4 Instead, the school commenced the instant litigation on
5 August 7, 2002 contending the rescission of the negative
6 declaration violated RLUIPA and was void under state law. The
7 suit named as defendants the Village of Mamaroneck, its ZBA, and
8 the members of the zoning board in their official capacities
9 (collectively, the Village or defendant).

10 On December 4, 2002 the district court granted WDS's motion
11 for partial summary judgment and held that the negative
12 declaration had not been properly rescinded, and therefore
13 remained in full force and effect. See Westchester Day Sch. v.
14 Vill. of Mamaroneck, 236 F. Supp. 2d 349 (S.D.N.Y. 2002). The
15 Village did not appeal this ruling. Instead, the ZBA proceeded
16 to conduct additional public hearings to consider the merits of
17 the application. The ZBA had the opportunity to approve the
18 application subject to conditions intended to mitigate adverse
19 effects on public health, safety, and welfare that might arise
20 from the project. Rather, on May 13, 2003 the ZBA voted 3-2 to
21 deny WDS's application in its entirety.

22 The stated reasons for the rejection included the effect the
23 project would have on traffic and concerns with respect to
24 parking and the intensity of use. Many of these grounds were
25 conceived after the ZBA closed its hearing process, giving the
26 school no opportunity to respond. The district court found the

1 stated reasons for denying the application were not supported by
2 evidence in the public record before the ZBA, and were based on
3 several factual errors. It surmised that the application was in
4 fact denied because the ZBA gave undue deference to the public
5 opposition of the small but influential group of neighbors who
6 were against the school's expansion plans. It also noted that
7 the denial of the application would result in long delay of WDS's
8 efforts to remedy the gross inadequacies of its facilities, and
9 substantially increase construction costs.

10 On May 29, 2003 the school filed an amended complaint
11 challenging the denial of its application. It asserted claims
12 under RLUIPA, 42 U.S.C. § 1983, and the All Writs Act. Neither
13 party demanded a jury trial. WDS moved for partial summary
14 judgment, and on September 5, 2003 the district court granted
15 that motion, holding that the Village had violated RLUIPA. See
16 Westchester Day Sch. v. Vill. of Mamaroneck, 280 F. Supp. 2d 230
17 (S.D.N.Y. 2003). When the Village appealed, we vacated the
18 district court's order and remanded the case for further
19 proceedings. See Westchester Day Sch. v. Vill. of Mamaroneck,
20 386 F.3d 183 (2d Cir. 2004). After remand, the Village, for the
21 first time, demanded a jury trial, which the district court
22 denied. See Westchester Day Sch. v. Vill. of Mamaroneck, 363 F.
23 Supp. 2d 667 (S.D.N.Y. 2005). The Village moved for summary
24 judgment, which the trial court denied as to WDS's RLUIPA and All
25 Writs Act claims, but granted as to the school's claim under 42

1 U.S.C. § 1983. See Westchester Day Sch. v. Vill. of Mamaroneck,
2 379 F. Supp. 2d 550 (S.D.N.Y. 2005).

3 A seven-day bench trial began on November 14, 2005 and
4 resulted in the March 2006 judgment. The district court ordered
5 the Village to issue WDS's special permit immediately, but
6 reserved decision on damages and attorneys' fees pending
7 appellate review. See Westchester Day Sch. v. Vill. of
8 Mamaroneck, 417 F. Supp. 2d 477 (S.D.N.Y. 2006). From this
9 ruling the Village appeals.¹

10 DISCUSSION

11 I Standard of Review

12 We review the district court's findings of fact for clear
13 error and its conclusions of law de novo. See Guiles ex rel.
14 Guiles v. Marineau, 461 F.3d 320, 323-24 (2d Cir. 2006).

15 II Application of RLUIPA

16 RLUIPA prohibits the government from imposing or
17 implementing a land use regulation in a manner that

18 imposes a substantial burden on the religious
19 exercise of a person, including a religious
20 assembly or institution, unless the
21 government demonstrates that imposition of
22 the burden on that person, assembly, or
23 institution (A) is in furtherance of a
24 compelling governmental interest; and (B) is
25 the least restrictive means of furthering
26 that compelling governmental interest.
27

¹ The United States, as intervenor and amicus curiae, and the Becket Fund for Religious Liberty, the Association of Christian Schools International, and the Council for Christian Colleges and Universities, as amici curiae, filed briefs in support of plaintiff.

1 42 U.S.C. § 2000cc(a)(1). This provision applies only when the
2 substantial burden imposed (1) is in a program that receives
3 Federal financial assistance; (2) affects commerce with foreign
4 nations, among the several states, or with Indian tribes; or (3)
5 "is imposed in the implementation of a land use regulation or
6 system of land use regulations, under which a government makes,
7 or has in place formal or informal procedures or practices that
8 permit the government to make, individualized assessments of the
9 proposed uses for the property involved." 42 U.S.C.
10 § 2000cc(a)(2).

11 A. Religious Exercise

12 Religious exercise under RLUIPA is defined as "any exercise
13 of religion, whether or not compelled by, or central to, a system
14 of religious belief." § 2000cc-5(7)(A). Further, using,
15 building, or converting real property for religious exercise
16 purposes is considered to be religious exercise under the
17 statute. § 2000cc-5(7)(B). To remove any remaining doubt
18 regarding how broadly Congress aimed to define religious
19 exercise, RLUIPA goes on to state that the Act's aim of
20 protecting religious exercise is to be construed broadly and "to
21 the maximum extent permitted by the terms of this chapter and the
22 Constitution." § 2000cc-3(g).

23 Commenting at an earlier stage in this litigation on how to
24 apply this standard, we expressed doubt as to whether RLUIPA
25 immunized all conceivable improvements proposed by religious
26 schools. That is to say, to get immunity from land use

1 regulation, religious schools need to demonstrate more than that
2 the proposed improvement would enhance the overall experience of
3 its students. Westchester Day Sch., 386 F.3d at 189. For
4 example, if a religious school wishes to build a gymnasium to be
5 used exclusively for sporting activities, that kind of expansion
6 would not constitute religious exercise. Or, had the ZBA denied
7 the Westchester Religious Institute's 1986 request for a special
8 permit to construct a headmaster's residence on a portion of the
9 property, such a denial would not have implicated religious
10 exercise. Nor would the school's religious exercise have been
11 burdened by the denial of a permit to build more office space.
12 Accordingly, we suggested the district court consider whether the
13 proposed facilities were for a religious purpose rather than
14 simply whether the school was religiously-affiliated. Id.

15 On remand, the district court conducted the proper inquiry.
16 It made careful factual findings that each room the school
17 planned to build would be used at least in part for religious
18 education and practice, finding that Gordon Hall and the other
19 facilities renovated as part of the project, in whole and in all
20 of their constituent parts, would be used for "religious
21 education and practice." In light of these findings, amply
22 supported in the record, the expansion project is a "building
23 [and] conversion of real property for the purpose of religious
24 exercise" and thus is religious exercise under § 2000cc-5(7)(B).

25 Hence, we need not now demarcate the exact line at which a
26 school expansion project comes to implicate RLUIPA. That line

1 exists somewhere between this case, where every classroom being
2 constructed will be used at some time for religious education,
3 and a case like the building of a headmaster's residence, where
4 religious education will not occur in the proposed expansion.

5 B. Substantial Burden

6 Since substantial burden is a term of art in the Supreme
7 Court's free exercise jurisprudence, we assume that Congress, by
8 using it, planned to incorporate the cluster of ideas associated
9 with the Court's use of it. See, e.g., Midrash Sephardi, Inc. v.
10 Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004), cert.
11 denied, 543 U.S. 1146 (2005) ("The Supreme Court's definition of
12 'substantial burden' within its free exercise cases is
13 instructive in determining what Congress understood 'substantial
14 burden' to mean in RLUIPA."). But see San Jose Christian Coll.
15 v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)
16 (applying dictionary meanings to define substantial burden as
17 "something that is oppressive" and "considerable in quantity").
18 Further, RLUIPA's legislative history indicates that Congress
19 intended the term substantial burden to be interpreted "by
20 reference to Supreme Court jurisprudence." 146 Cong. Rec. S7774,
21 S7776 (2000).

22 Supreme Court precedents teach that a substantial burden on
23 religious exercise exists when an individual is required to
24 "choose between following the precepts of her religion and
25 forfeiting benefits, on the one hand, and abandoning one of the
26 precepts of her religion . . . on the other hand." Sherbert v.

1 Verner, 374 U.S. 398, 404 (1963). A number of courts use this
2 standard as the starting point for determining what is a
3 substantial burden under RLUIPA. See, e.g., Lovelace v. Lee, 472
4 F.3d 174, 187 (4th Cir. 2006) (For RLUIPA purposes, a substantial
5 burden is something that "puts substantial pressure on an
6 adherent to modify his behavior."). In the context in which this
7 standard is typically applied -- for example, a state's denial of
8 unemployment compensation to a Jehovah's Witness who quit his job
9 because his religious beliefs prevented him from participating in
10 the production of war materials, see Thomas v. Review Bd. of Ind.
11 Employment Sec. Div., 450 U.S. 707, 709 (1981) -- it is not a
12 difficult standard to apply. By denying benefits to Jehovah's
13 Witnesses who follow their beliefs, the state puts undue pressure
14 on the adherents to alter their behavior and to violate their
15 beliefs in order to obtain government benefits, thereby imposing
16 a substantial burden on religious exercise.

17 But in the context of land use, a religious institution is
18 not ordinarily faced with the same dilemma of choosing between
19 religious precepts and government benefits. When a municipality
20 denies a religious institution the right to expand its
21 facilities, it is more difficult to speak of substantial pressure
22 to change religious behavior, because in light of the denial the
23 renovation simply cannot proceed. Accordingly, when there has
24 been a denial of a religious institution's building application,
25 courts appropriately speak of government action that directly
26 coerces the religious institution to change its behavior, rather

1 than government action that forces the religious entity to choose
2 between religious precepts and government benefits. See, e.g.,
3 Midrash Sephardi, 366 F.3d at 1227 ("[A] substantial burden is
4 akin to significant pressure which directly coerces the religious
5 adherent to conform his or her behavior accordingly."). Here,
6 WDS contends that the denial of its application in effect coerced
7 the day school to continue teaching in inadequate facilities,
8 thereby impeding its religious exercise.

9 Yet, when the denial of a religious institution's
10 application to build is not absolute, such would not necessarily
11 place substantial pressure on the institution to alter its
12 behavior, since it could just as easily file a second application
13 that remedies the problems in the first. As a consequence, as we
14 said when this case was earlier before us, "rejection of a
15 submitted plan, while leaving open the possibility of approval of
16 a resubmission with modifications designed to address the cited
17 problems, is less likely to constitute a 'substantial burden'
18 than definitive rejection of the same plan, ruling out the
19 possibility of approval of a modified proposal." Westchester Day
20 Sch., 386 F.3d at 188. Of course, a conditional denial may
21 represent a substantial burden if the condition itself is a
22 burden on free exercise, the required modifications are
23 economically unfeasible, or where a zoning board's stated
24 willingness to consider a modified plan is disingenuous. Id. at
25 188 n.3. However, in most cases, whether the denial of the
26 application was absolute is important; if there is a reasonable

1 opportunity for the institution to submit a modified application,
2 the denial does not place substantial pressure on it to change
3 its behavior and thus does not constitute a substantial burden on
4 the free exercise of religion.

5 We recognize further that where the denial of an
6 institution's application to build will have minimal impact on
7 the institution's religious exercise, it does not constitute a
8 substantial burden, even when the denial is definitive. There
9 must exist a close nexus between the coerced or impeded conduct
10 and the institution's religious exercise for such conduct to be a
11 substantial burden on that religious exercise. Imagine, for
12 example, a situation where a school could easily rearrange
13 existing classrooms to meet its religious needs in the face of a
14 rejected application to renovate. In such case, the denial would
15 not substantially threaten the institution's religious exercise,
16 and there would be no substantial burden, even though the school
17 was refused the opportunity to expand its facilities.

18 Note, however, that a burden need not be found insuperable
19 to be held substantial. See Saints Constantine and Helen Greek
20 Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901
21 (7th Cir. 2005). When the school has no ready alternatives, or
22 where the alternatives require substantial "delay, uncertainty,
23 and expense," a complete denial of the school's application might
24 be indicative of a substantial burden. See id.

25 We are, of course, mindful that the Supreme Court's free
26 exercise jurisprudence signals caution in using effect alone to

1 determine substantial burden. See generally Lyng v. Nw. Indian
2 Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (observing
3 that the "line between unconstitutional prohibitions on the free
4 exercise of religion and the legitimate conduct by government of
5 its own affairs . . . cannot depend on measuring the effects of a
6 governmental action on a religious objector's spiritual
7 development" (emphasis added)). This is because an effect
8 focused analysis may run up against the reality that "[t]he
9 freedom asserted by [some may] bring them into collision with
10 [the] rights asserted by" others and that "[i]t is such conflicts
11 which most frequently require intervention of the State to
12 determine where the rights of one end and those of another
13 begin." Braunfeld v. Brown, 366 U.S. 599, 604 (1961).
14 Accordingly, the Supreme Court has held that generally applicable
15 burdens, neutrally imposed, are not "substantial." See Jimmy
16 Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389-91
17 (1990).

18 This reasoning helps to explain why courts confronting free
19 exercise challenges to zoning restrictions rarely find the
20 substantial burden test satisfied even when the resulting effect
21 is to completely prohibit a religious congregation from building
22 a church on its own land. See Christian Gospel Church, Inc. v.
23 City and County of S.F., 896 F.2d 1221, 1224 (9th Cir. 1990);
24 Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824-
25 25 (10th Cir. 1988); Grosz v. City of Miami Beach, 721 F.2d 729,
26 739-40 (11th Cir. 1983); Lakewood, Ohio Congregation of Jehovah's

1 Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 304 (6th Cir.
2 1983); cf. Islamic Ctr. of Miss., Inc. v. City of Starkville, 840
3 F.2d 293, 302-03 (5th Cir. 1988) (finding substantial burden
4 where city intentionally discriminated against Muslims and
5 ordinance "leaves no practical alternatives for establishing a
6 mosque in the city limits").

7 A number of our sister circuits have applied this same
8 reasoning in construing RLUIPA's substantial burden requirement.
9 For example, the Seventh Circuit has held that land use
10 conditions do not constitute a substantial burden under RLUIPA
11 where they are "neutral and traceable to municipal land planning
12 goals" and where there is no evidence that government actions
13 were taken "because [plaintiff] is a religious institution."
14 Vision Church v. Vill. of Long Grove, 468 F.3d 975, 998-99 (7th
15 Cir. 2006). Similarly, the Ninth Circuit has held that no
16 substantial burden was imposed, even where an ordinance "rendered
17 [plaintiff] unable to provide education and/or worship" on its
18 property, because the plaintiff was not "precluded from using
19 other sites within the city" and because "there [is no] evidence
20 that the City would not impose the same requirements on any other
21 entity." San Jose Christian Coll., 360 F.3d at 1035. The
22 Eleventh Circuit has also ruled that "reasonable 'run of the
23 mill' zoning considerations do not constitute substantial
24 burdens." Midrash Sephardi, 366 F.3d at 1227-28 & n.11.

25 The same reasoning that precludes a religious organization
26 from demonstrating substantial burden in the neutral application

1 of legitimate land use restrictions may, in fact, support a
2 substantial burden claim where land use restrictions are imposed
3 on the religious institution arbitrarily, capriciously, or
4 unlawfully. The arbitrary application of laws to religious
5 organizations may reflect bias or discrimination against
6 religion. Thus, in Saints Constantine and Helen, the Seventh
7 Circuit concluded that a substantial burden was demonstrated in
8 circumstances where the "decision maker cannot justify" the
9 challenged ruling and where "repeated legal errors by the City's
10 officials casts doubt on their good faith." 396 F.3d at 899-01.
11 Similarly, in Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d
12 978, 989-91 (9th Cir. 2006), the Ninth Circuit held that a
13 substantial burden was shown where government officials
14 "inconsistently applied" specific policies and disregarded
15 relevant findings "without explanation." Where the arbitrary,
16 capricious, or unlawful nature of a defendant's challenged action
17 suggests that a religious institution received less than even-
18 handed treatment, the application of RLUIPA's substantial burden
19 provision usefully "backstops the explicit prohibition of
20 religious discrimination in the later section of the Act."
21 Saints Constantine and Helen, 396 F.3d at 900.

22 Accordingly, we deem it relevant to the evaluation of WDS's
23 particular substantial burden claim that the district court
24 expressly found that the zoning board's denial of the school's
25 application was "arbitrary and capricious under New York law
26 because the purported justifications set forth in the Resolution

1 do not bear the necessary substantial relation to public health,
2 safety or welfare," and the zoning board's findings are not
3 supported by substantial evidence. Westchester Day Sch., 417 F.
4 Supp. 2d at 564. Although the Village disputes this finding, we
5 conclude that it is amply supported by both the law and the
6 record evidence.

7 As the New York Court of Appeals has made plain, a zoning
8 board decision based on grounds "unrelated to the public's
9 health, safety or welfare" is "beyond the scope of the
10 municipality's police power, and, thus, impermissible." Cornell
11 Univ. v. Bagnardi, 68 NY2d 583, 597 (1986). Even when a board
12 considers permissible factors, the law demands that its analysis
13 be supported by substantial evidence. Twin County Recycling
14 Corp. v. Yevoli, 90 NY2d 1000, 1002 (1997) (mem.). Moreover,
15 under New York law, a municipality may not demand that a
16 religious institution show that "no ill effects will result from
17 the proposed use in order to receive a special permit," because
18 such a requirement "fails to recognize that educational and
19 religious uses ordinarily have inherent beneficial effects that
20 must be weighed against their potential for harming the
21 community." Bagnardi, 68 NY2d at 597.

22 The district court reasonably concluded that the ZBA failed
23 to comply with these legal mandates in several respects. For
24 example, the zoning board denied WDS's application based, in
25 part, on an accusation that the school made "a willful attempt"
26 to mislead the zoning board. In fact, the accusation was

1 unsupported by the evidence and based on the zoning board's own
2 error with respect to certain relevant facts. Westchester Day
3 Sch., 417 F. Supp. 2d at 531, 571. The ZBA's allegations of
4 deficiencies in the school's traffic study were also unsupported
5 by the evidence before it. See id. at 564-66. The concern about
6 lack of adequate parking was based on the zoning board's own
7 miscalculation. See id. at 567. Indeed, the ZBA impermissibly
8 based its decision on speculation about future expansion, without
9 a basis in fact. See id. at 568. In each of these instances,
10 the ZBA's assumptions were not only wrong; they were unsupported
11 by its own experts. See id. at 532, 566, 567, 569. Indeed, the
12 resolution drafted by the ZBA's consultants, which would have
13 approved WDS's application subject to conditions addressing
14 various ZBA concerns, was never circulated to the whole zoning
15 board before it issued the challenged denial. See id. at 569.
16 In sum, the record convincingly demonstrates that the zoning
17 decision in this case was characterized not simply by the
18 occasional errors that can attend the task of government but by
19 an arbitrary blindness to the facts. As the district court
20 correctly concluded, such a zoning ruling fails to comply with
21 New York law.

22 While the arbitrary and unlawful nature of the ZBA denial of
23 WDS's application supports WDS's claim that it has sustained a
24 substantial burden, two other factors drawn from our earlier
25 discussion must be considered in reaching such a burden
26 determination: (1) whether there are quick, reliable, and

1 financially feasible alternatives WDS may utilize to meet its
2 religious needs absent its obtaining the construction permit; and
3 (2) whether the denial was conditional. These two considerations
4 matter for the same reason: when an institution has a ready
5 alternative -- be it an entirely different plan to meet the same
6 needs or the opportunity to try again in line with a zoning
7 board's recommendations -- its religious exercise has not been
8 substantially burdened. The plaintiff has the burden of
9 persuasion with respect to both factors. See § 2000cc-2 (putting
10 burden on plaintiff to prove that government's action
11 substantially burdened plaintiff's exercise of religion).

12 Here, the school could not have met its needs simply by
13 reallocating space within its existing buildings. The
14 architectural firm it hired determined that certain essential
15 facilities would have to be incorporated into a new building,
16 because not enough space remained in the existing buildings to
17 accommodate the school's expanding needs. Further, experts hired
18 by WDS determined that the planned location for Gordon Hall was
19 the only site that would accommodate the new building. The
20 answer to the first factor is there were not only no quick,
21 reliable, or economically feasible alternatives, there were no
22 alternatives at all.

23 In examining the second factor -- whether the Village's
24 denial of the school's application was conditional or absolute --
25 we look at several matters: (a) whether the ZBA classified the
26 denial as complete, (b) whether any required modification would

1 itself constitute a burden on religious exercise; (c) whether
2 cure of the problems noted by the ZBA would impose so great an
3 economic burden as to make amendment unworkable; and (d) whether
4 the ZBA's stated willingness to consider a modified proposal was
5 disingenuous. See Westchester Day Sch., 386 F.3d at 188 n.3.

6 For any of the following reasons, we believe the denial of
7 WDS's application was absolute. First, we observe that the ZBA
8 could have approved the application subject to conditions
9 intended to mitigate adverse effects on public health, safety,
10 and welfare. Yet the ZBA chose instead to deny the application
11 in its entirety. It is evident that in the eyes of the ZBA's
12 members, the denial was final since all of them discarded their
13 notes after voting on the application. Second, were WDS to
14 prepare a modified proposal, it would have to begin the
15 application process anew. This would have imposed so great an
16 economic burden as to make the option unworkable. Third, the
17 district court determined that ZBA members were not credible when
18 they testified they would give reasonable consideration to
19 another application by WDS. When the board's expressed
20 willingness to consider a modified proposal is insincere, we do
21 not require an institution to file a modified proposal before
22 determining that its religious exercise has been substantially
23 burdened.

24 Consequently, we are persuaded that WDS has satisfied its
25 burden in proving that there was no viable alternative to achieve
26 its objectives, and we conclude that WDS's religious exercise was

1 substantially burdened by the ZBA's arbitrary and unlawful denial
2 of its application.

3 C. Least Restrictive Means to Further a
4 Compelling State Interest
5

6 Under RLUIPA, once a religious institution has demonstrated
7 that its religious exercise has been substantially burdened, the
8 burden of proof shifts to the municipality to prove it acted in
9 furtherance of a compelling governmental interest and that its
10 action is the least restrictive means of furthering that
11 interest. § 2000cc-2(b). Compelling state interests are
12 "interests of the highest order." Church of the Lukumi Babalu
13 Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993). The
14 Village claims that it has a compelling interest in enforcing
15 zoning regulations and ensuring residents' safety through traffic
16 regulations. However, it must show a compelling interest in
17 imposing the burden on religious exercise in the particular case
18 at hand, not a compelling interest in general. See, e.g.,
19 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546
20 U.S. 418, 432 (2006) ("Under the more focused inquiry required by
21 RFRA and the compelling interest test, the Government's mere
22 invocation of the general characteristics of Schedule I
23 substances . . . cannot carry the day. . . . [T]here is no
24 indication that Congress . . . considered the harms posed by the
25 particular use at issue here" (emphases added)).

26 The district court's findings reveal the ZBA's stated
27 reasons for denying the application were not substantiated by

1 evidence in the record before it. The court stated the
2 application was denied not because of a compelling governmental
3 interest that would adversely impact public health, safety, or
4 welfare, but was denied because of undue deference to the
5 opposition of a small group of neighbors.

6 Further, even were we to determine that there was a
7 compelling state interest involved, the Village did not use the
8 least restrictive means available to achieve that interest. The
9 ZBA had the opportunity to approve the application subject to
10 conditions, but refused to consider doing so.

11 III Constitutionality of RLUIPA

12 Given our conclusion that the ZBA violated RLUIPA by denying
13 WDS's application, the question remains whether RLUIPA was
14 constitutionally applied. The Village challenges RLUIPA on the
15 grounds that it exceeds Congress' Fourteenth Amendment (§ 5) and
16 Commerce Clause powers and that the Act is unconstitutional under
17 the Tenth Amendment and the Establishment Clause.

18 RLUIPA states that it only applies when (1) "the substantial
19 burden is imposed in a program or activity that receives Federal
20 financial assistance . . . ," (2) "the substantial burden
21 affects, or removal of that substantial burden would affect,
22 commerce with foreign nations, among the several States, or with
23 Indian tribes . . . ," or (3) "the substantial burden is imposed
24 in the implementation of a land use regulation or system of land
25 use regulations, under which a government makes, or has in place
26 formal or informal procedures or practices that permit the

1 government to make, individualized assessments of the proposed
2 uses for the property involved." § 2000cc(a)(2).

3 By limiting RLUIPA's scope to cases that present one of
4 these jurisdictional nexuses, Congress alternatively grounded
5 RLUIPA, depending on the facts of a particular case, in the
6 Spending Clause, the Commerce Clause, and § 5 of the Fourteenth
7 Amendment. There is no claim here that the ZBA receives federal
8 financial assistance, but WDS does assert both that the
9 substantial burden on its religious exercise affects interstate
10 commerce and that it is imposed through formal procedures that
11 permit the government to make individualized assessments of the
12 proposed uses for the property involved. Thus, we must examine
13 whether RLUIPA is constitutionally applied under Congress'
14 Commerce Clause power or whether it is constitutionally applied
15 under Congress' power to create causes of action vindicating
16 Fourteenth Amendment rights.

17 A. Congress' Power Under the Commerce Clause

18 The Constitution grants Congress the power "[t]o regulate
19 Commerce . . . among the several States." U.S. Const. art. I,
20 § 8, cl. 3. As noted above, Congress made explicit reference to
21 this grant by limiting the application of RLUIPA to cases in
22 which, inter alia, "the substantial burden affects, or removal of
23 that substantial burden would affect, commerce . . . among the
24 several States." § 2000cc(a)(2)(B).

25 As the Supreme Court has made plain, the satisfaction of
26 such a jurisdictional element -- common in both civil and

1 criminal cases -- is sufficient to validate the exercise of
2 congressional power because an interstate commerce nexus must be
3 demonstrated in each case for the statute in question to operate.
4 See United States v. Morrison, 529 U.S. 598, 611-12 (2000) ("Such
5 a jurisdictional element may establish that the enactment is in
6 pursuance of Congress' regulation of interstate commerce.");
7 United States v. Lopez, 514 U.S. 549, 561 (1995) (noting that
8 statute in question "contains no jurisdictional element which
9 would ensure, through case-by-case inquiry, that the [activity]
10 in question affects interstate commerce"). Following suit, this
11 Court has consistently upheld statutes under the Commerce Clause
12 on the basis of jurisdictional elements. See, e.g., United
13 States v. Griffith, 284 F.3d 338, 346-48 (2d Cir. 2002); United
14 States v. Santiago, 238 F.3d 213, 216 (2d Cir. 2001) (per
15 curiam). Consistent with this precedent, we now hold that, where
16 the relevant jurisdictional element is satisfied, RLUIPA
17 constitutes a valid exercise of congressional power under the
18 Commerce Clause. See, e.g., United States v. Maui County, 298 F.
19 Supp. 2d 1010, 1015 (D. Haw. 2003) (reaching same conclusion);
20 Freedom Baptist Church v. Twp. of Middletown, 204 F. Supp. 2d
21 857, 866-68 (E.D. Pa. 2002) (same).

22 In this case, the district court found the jurisdictional
23 element satisfied by evidence that the construction of Gordon
24 Hall, a 44,000 square-foot building with an estimated cost of
25 \$9 million, will affect interstate commerce. We identify no
26 error in this conclusion. As we have recognized, the evidence

1 need only demonstrate a minimal effect on commerce to satisfy the
2 jurisdictional element. See Griffith, 284 F.3d at 347. Further,
3 we have expressly noted that commercial building construction is
4 activity affecting interstate commerce. See Reich v.
5 Mashantucket Sand & Gravel, 95 F.3d 174, 181 (2d Cir. 1996)
6 ("[C]onstruction efforts . . . have a direct effect on interstate
7 commerce.").

8 In light of our determination that RLUIPA's application in
9 the present case is constitutional under the Commerce Clause,
10 there is no need to consider or decide whether its application
11 could be grounded alternatively in § 5 of the Fourteenth
12 Amendment.

13 B. Tenth Amendment

14 The Tenth Amendment provides that "the powers not delegated
15 to the United States by the Constitution, nor prohibited by it to
16 the States, are reserved to the States respectively, or the
17 people." As the Supreme Court has explained, "[i]f a power is
18 delegated to Congress in the Constitution, the Tenth Amendment
19 expressly disclaims any reservation of that power to the States."
20 New York v. United States, 505 U.S. 144, 156 (1992). The power
21 to regulate interstate commerce was delegated to Congress in the
22 Constitution. Nonetheless, in New York, the Court said that even
23 in situations where Congress has the power to pass laws requiring
24 or prohibiting certain acts, it has no power "directly to compel
25 the States to require or prohibit those acts." Id. at 166. We
26 do not believe RLUIPA directly compels states to require or

1 prohibit any particular acts. Instead, RLUIPA leaves it to each
2 state to enact and enforce land use regulations as it deems
3 appropriate so long as the state does not substantially burden
4 religious exercise in the absence of a compelling interest
5 achieved by the least restrictive means.

6 C. Establishment Clause

7 In determining whether a particular law violates the
8 Establishment Clause, which provides in the First Amendment that
9 "Congress shall make no law respecting an establishment of
10 religion," U.S. Const. amend. I, we examine the government
11 conduct at issue under the three-prong analysis articulated by
12 the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971).
13 Under Lemon, government action that interacts with religion must:
14 (1) have a secular purpose, (2) have a principal effect that
15 neither advances nor inhibits religion, and (3) not bring about
16 an excessive government entanglement with religion. Id. at 612-
17 13. RLUIPA's land use provisions plainly have a secular purpose,
18 that is, the same secular purpose that RLUIPA's institutionalized
19 persons provisions have: to lift government-created burdens on
20 private religious exercise. See Cutter v. Wilkinson, 544 U.S.
21 709, 720 (2005). As the Supreme Court explained in Cutter, such
22 purpose is "compatible with the Establishment Clause." Id.

23 Similarly, the principal or primary effect of RLUIPA's land
24 use provisions neither advances nor inhibits religion. As the
25 Supreme Court has explained, a law produces forbidden effects
26 under Lemon if "the government itself has advanced religion

1 through its own activities and influence." Corp. of Presiding
2 Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,
3 483 U.S. 327, 337 (1987). Under RLUIPA, the government itself
4 does not advance religion; all RLUIPA does is permit religious
5 practitioners the free exercise of their religious beliefs
6 without being burdened unnecessarily by the government.

7 Finally, RLUIPA's land use provisions do not foster an
8 excessive government entanglement with religion. Although the
9 Village contends that RLUIPA fails every part of the Lemon test,
10 it makes no argument that the land use provisions foster
11 intolerable levels of interaction between church and state or the
12 continuing involvement of one in the affairs of the other.
13 Agostini v. Felton, 521 U.S. 203, 232-33 (1997); Walz v. Tax
14 Comm'n of N.Y., 397 U.S. 664, 674-75 (1970). Further,
15 entanglement becomes excessive only when it advances or inhibits
16 religion. Agostini, 521 U.S. at 233 (treating entanglement prong
17 as aspect of effects prong under Lemon test); Skoros v. City of
18 N.Y., 437 F.3d 1, 36 (2d Cir. 2006). RLUIPA cannot be said to
19 advance religion simply by requiring that states not discriminate
20 against or among religious institutions. See Midrash Sephardi,
21 366 F.3d at 1241.

22 Accordingly, we find that RLUIPA's land use provisions do
23 not violate the Establishment Clause.

24 IV Jury Waiver

25 We turn finally to the question of whether defendant waived
26 its right to trial by jury. Under Federal Rule of Civil

1 Procedure 38(b), "[a]ny party may demand a trial by jury of any
2 issue triable of right by a jury." Failure to serve a demand
3 constitutes a waiver of that right. Fed. R. Civ. P. 38(d).
4 Here, the Village initially failed to demand a jury trial. A
5 litigant who has waived a jury may nonetheless demand one with
6 respect to new issues raised by later pleadings, unless the new
7 issues are simply "artful rephrasings" of existing issues. See
8 Rosen v. Dick, 639 F.2d 82, 94 (2d Cir. 1980). When the same
9 parties are the litigants before and after an amended pleading,
10 we are unlikely to find a new issue has been raised. Id. at 96.
11 An amended complaint asserting new theories of recovery, based on
12 the same facts as the original complaint, will not renew a
13 defendant's right to a jury trial when that right was waived with
14 respect to the original complaint. 8 James Wm. Moore, Moore's
15 Federal Practice § 38.50[8][d] (3d ed. 2006).

16 The Village declares its amended answer -- filed a year and
17 a half after commencement of the suit -- raised new issues, and
18 that it therefore had a right to demand a new trial on those
19 issues. But its amended answer was identical to its initial
20 answer except that it added a number of affirmative defenses not
21 asserted earlier. The new affirmative defenses alleged that
22 defendant's denial of WDS's application was not a complete
23 denial, that it did not substantially burden WDS's free exercise
24 of religion, that the denial was based on compelling state
25 interests, and that RLUIPA if applied to WDS's activities is
26 unconstitutional. By denying plaintiff's contrary allegations,

1 the defendant had already raised the first three issues in its
2 initial answer.

3 We are left with the Village's affirmative defense that
4 RLUIPA if applied to WDS's activities would be unconstitutional.
5 But the defendant was on notice that the court would be deciding
6 all issues relating to the general dispute. The Village should
7 reasonably have known at the time it initially waived its jury
8 trial right that the constitutionality of RLUIPA could constitute
9 a part of the dispute. Like an amended complaint that simply
10 asserts new theories of recovery, an amended answer that asserts
11 new defense theories based on the same facts does not reestablish
12 the defendant's right to demand a jury trial. Hence, the
13 district court correctly ruled the Village had not revived its
14 right to such under Rule 38(b).

15 The Village also insists that the district court abused its
16 discretion by not ordering a jury trial under Rule 39(b). Rule
17 39(b) provides that "notwithstanding the failure of a party to
18 demand a jury . . . , the court in its discretion upon motion may
19 order a trial by a jury of any or all issues." We have ruled
20 that "inadvertence in failing to make a timely jury demand does
21 not warrant a favorable exercise of discretion under Rule 39(b)."
22 Noonan v. Cunard S.S. Co., 375 F.2d 69, 70 (2d Cir. 1967)
23 (Friendly, J.); see also Higgins v. Boeing Co., 526 F.2d 1004,
24 1006 n.2 (2d Cir. 1975) (per curiam) ("[D]espite the
25 discretionary language of Rule 39(b) some cause beyond mere
26 inadvertence must be shown to permit granting an untimely

1 demand."). Here, the Village admits that it neglected to demand
2 a jury in June 2003. Accordingly, it was not an abuse of
3 discretion for the district court to deny the Village's 2004
4 request for a favorable exercise of its discretion under Rule
5 39(b).

6 V All Writs Act and Supplemental State Law Claims

7 After determining the Village violated RLUIPA, the district
8 court ordered the ZBA immediately and unconditionally to issue
9 WDS's special permit modification. Such relief is proper under
10 RLUIPA. See § 2000cc-2(a) (parties asserting RLUIPA claims may
11 obtain "appropriate relief" against a government). As a
12 consequence, there is no need for us to examine the alternative
13 bases the district court provided to justify this relief.

14 CONCLUSION

15 Accordingly, for the foregoing reasons, the judgment of the
16 district court is affirmed.