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# Regulation of Religious Land Uses

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Uses of land by religious organizations usually raise the same land use concerns as their secular counterparts. The size and scale of the building impacts neighboring properties, as does the nature of the land use. If places of assembly are involved, there are issues of traffic, parking, and noise. There may well be comparable environmental and aesthetic concerns. However, for both policy and legal reasons local governments must be particularly sensitive about land use regulation of religious land uses. These land uses make important contributions to the community and the free exercise of religion has constitutional and statutory protection.

In 2000 Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to codify some of these protections. There has been a substantial amount of RLUIPA litigation as religious entities have sought and sometimes obtained relief from the application of local land use regulations. Some religious institutions have taken the position that any regulation restricting their location or limiting their development is illegal under the act. While this "near exemption" position has not been accepted by the courts, the threat of litigation, damages, and attorney fees has created a good deal of concern among local governments and affected the land use decision-making process when religious entities are involved.

## I. Land Use Regulation of Religious Uses

Many religious activities and venues can be affected to some degree by land use regulations. Zoning districts define the uses that can be located on a particular site, and they may exclude houses of worship as well as other uses sponsored by religious bodies, such as schools, day care facilities, homeless shelters, and food banks. Dimensional requirements may establish setbacks or height limits that affect religious structures. Parking, landscaping, noise, and sign regulations also may limit options open to religious groups.

A number of state courts in the 1950s invalidated local government attempts to use zoning to limit religious uses in residential areas of the nation's burgeoning suburbs, but the more recent trend has been to subject religious uses to the same generally applicable standards as comparable secular uses.

In North Carolina, most local governments have traditionally applied their land use regulations to religious uses.[1] For the most part, however, religious uses are treated sympathetically in most local land use regulations and the restrictions applied have been modest. Places of worship are either favored or considered relatively benign from a land use impact perspective; therefore, they usually are allowed in most zoning districts, though more stringent standards may be applied to facilities that serve large numbers of people.

## II. Constitutional Background

The First Amendment both prohibits the establishment of a state religion and protects individuals in their free exercise of religion. The North Carolina Constitution also protects freedom of religion.[2]

Several aspects of constitutional jurisprudence on religious freedom are clear. Government may not regulate religious beliefs. Constitutional protection of the free exercise of religion also extends beyond beliefs to many physical acts based on those beliefs, such as assembling for worship and partaking of sacraments. For example, a regulation designed specifically to prohibit animal sacrifice by followers of the Santería religion (as opposed to a uniformly applicable law on animal slaughter) was invalidated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[3]

A key early case, *Sherbert v. Verner*,[4] addressed whether religious exceptions were required for general governmental regulations. The court established strong judicial protection of free exercise rights. Sherbert was a Seventh-Day Adventist who lost her job in a South Carolina textile mill for refusing to work on Saturdays after the mill expanded from a five-day to a six-day workweek. The Court set a strict scrutiny test for government regulations that significantly burden religious practices: the regulation is invalid unless the government is both addressing a compelling state interest and has chosen a narrowly tailored method of regulation.

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1. *See, e.g.*, Grace Baptist Church v. City of Oxford, 320 N.C. 439, 358 S.E.2d 372 (1987) (application of paving requirement for off-street parking to church); Convent of Sisters of St. Joseph v. City of Winston-Salem, 243 N.C. 316, 90 S.E.2d 879 (1956) (application of zoning to parochial school); Jirtle v. Board of Adjustment, 175 N.C. App. 178, 622 S.E.2d 713 (2005) (application of zoning to a church-related food pantry); Allen v. City of Burlington Bd. of Adjustment, 100 N.C. App. 615, 397 S.E.2d 657 (1990) (application of zoning to a community kitchen operated by a religious group).

2. The state constitution provides, "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. CONST. art. 1, § 13 (1996). The court has held this provision both guarantees freedom of religious profession and worship and establishes a separation of religion and government. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

3. 508 U.S. 520 (1993).

4. 374 U.S. 398 (1963). This test was reaffirmed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating law mandating school attendance for Amish children).

However, in *Employment Division, Department of Human Resources v. Smith*,[5] the Court retreated from this strict judicial scrutiny. Two Oregon counselors, members of the Native American Church, were fired from their private drug rehabilitation firm because of their use of peyote. It was undisputed that the ingestion of hallucinogenic peyote was one of their religious sacraments. After the counselors were denied unemployment benefits on the ground that they had been dismissed for "misconduct"—peyote use was a criminal offense in Oregon at that time—they challenged the determination. The Oregon Supreme Court applied the *Sherbert* test and ruled that the counselors were entitled to unemployment compensation because the governmental interest involved (preserving the financial integrity of the compensation fund) was not a sufficiently compelling governmental interest to justify substantially burdening the counselors' religious expression. However, on appeal the Supreme Court ruled that if the regulation is a valid and neutral law of general applicability, the Constitution does not mandate that the legislature provide a religion-based exemption. The Court concluded, "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense."[6]

The North Carolina court reached a similar result. A person convicted of peyote and marijuana use contended that their consumption was a sacramental part of his Neo-American Church. The court noted that the Free Exercise Clause "permits a citizen complete freedom of religion. He may belong to any church or to no church and may believe whatever he will, however, fantastic, illogical or unreasonable, but nowhere does it authorize him in the exercise of his religion to commit acts which constitute threats to the public safety, morals, peace and order."[7]

The *Smith* analysis was soon applied in the land use area. For example, federal courts held that a Salvation Army shelter was not exempt from state regulations on rooming houses and boarding houses[8] and that a historic preservation ordinance was applicable to a church.[9]

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5. 494 U.S. 872 (1990).

6. *Id*. at 885 (citations omitted).

7. State v. Bullard, 267 N.C. 599, 603, 148 S.E.2d 565, 568 (1966).

8. Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183 (3d Cir. 1990) (holding that even though operation of the shelter is a sacrament for the Salvation Army, *Smith* requires application of neutral, generally applicable regulations on boarding houses).

9. St. Bartholomew's Church v. N. Y., 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). The court applied a *Smith* analysis and concluded that the New York Landmark Law was a neutral law of general application. Although the law substantially limited the church's options for using its real estate holdings to raise revenue, the court found that it did not prevent the church from carrying out its religious and charitable missions in its current building. *See also* Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir. 1999) (upholding refusal to rezone single-family area for religious cemetery, noting locational restriction was a neutral law of general applicability); Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995). *But see* Mount St. Scholastica, Inc. v. City of Atchison, 482 F. Supp. 2d 1281 (D. Kan. 2007) (since state historic preservation statute allowed city council to

## III. Initial Statutory Response: RFRA

In response to a perceived weakening of the protection of religious freedom resulting from the *Smith* decision, Congress in 1993 enacted the Religious Freedom Restoration Act (RFRA),[10] the key provisions of which established a strict scrutiny test for any government regulations that significantly burden religious freedom. The law provided that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability]"[11] Exceptions were allowed only if there was a "compelling governmental interest" and if the government had chosen the "least restrictive means" of furthering that interest.[12] The express intent of Congress in enacting the law was to overturn the *Smith* decision and return to the *Sherbert* strict scrutiny standard for reviewing substantial governmental infringement on religious liberty.[13]

In *City of Boerne v. Flores*,[14] the Court ruled that Congress had exceeded its authority in adopting the RFRA and declared the act unconstitutional. The Court held that although Congress can enact legislation to remedy violations of constitutional protections, it cannot enact laws that change the scope of those rights. In addition, the Court held that the historic preservation ordinance involved did not violate the *Smith* standard: "It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."[15]

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overrule order denying demolition upon finding no feasible and prudent alternatives are available, law is not one of general application and thus strict scrutiny under the First Amendment applies). The Washington state court has continued to apply a *Sherbert* analysis to invalidate landmark protection ordinances. Munns v. Martin, 930 P.2d 318 (Wash. 1997); First United Methodist Church v. Hearing Examiner for Seattle Landmarks Preservation Bd., 916 P.2d 374 (Wash. 1996); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992).

10. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

11. 42 U.S.C. § 2000bb-1(a).

12. *See* 42 U.S.C. § 2000bb-1(b).

13. *See* 42 U.S.C. § 2000bb(b)(1).

14. 521 U.S. 507 (1997).

15. *Id*. at 535.

## IV. Current Statutory Regime: RLUIPA

### 1. Key Provisions of Statute

Congress responded to the *Boerne* decision by adopting the Religious Land Use and Institutionalized Persons Act (RLUIPA).[16] To overcome the constitutional infirmity identified in *Boerne*, the proponents of the law contend it is a remedial action authorized by U.S. Const. Amend. XIV, § 5.[17]

RLUIPA establishes two principal rules regarding land use regulation of religious activities. First is a general rule that zoning and landmarking laws that limit the use or development of property shall not impose a substantial burden on religious exercise (including religious assembly) unless it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Second, the law mandates that land use regulations treat religious assemblies on equal terms with nonreligious uses, not discriminate on the basis of religion or religious denomination, and not totally exclude nor unreasonably limit religious assemblies or structures. The key textual provisions relative to land use regulations are set out below.

**§ 2000cc. Protection of land use as religious exercise**

**(a) Substantial burdens**

**(1) General rule.** No government shall 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, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

**(A)** is in furtherance of a compelling governmental interest; and

**(B)** is the least restrictive means of furthering that compelling governmental interest.

**(2) Scope of application.** This subsection applies in any case in which—

**(A)** the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

**(B)** the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

**(C)** the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

**(b) Discrimination and exclusion**

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16. Pub. L. No. 106-274 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2004)). The law was effective September 22, 2000. For an overview, see Patricia E. Salkin and Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195 (2008).

17. Whether there is in fact the requisite widespread pattern or practice of discrimination against religious land uses to justify remedial action is strongly contested in the academic legal literature.

**(1) Equal terms.** No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
**(2) Nondiscrimination.** No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
**(3) Exclusions and limits.** No government shall impose or implement a land use regulation that—

**(A)** totally excludes religious assemblies from a jurisdiction; or
**(B)** unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

**§ 2000cc–5. Definitions**
In this chapter:
**(5) Land use regulation**
The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

While the Supreme Court upheld the constitutionality of the institutionalized persons provisions of the act,[18] it has not yet directly addressed the land use provisions. Lower courts have concluded that the land use provisions of the act are facially valid.[19]

18. The section of RLUIPA addressing institutionalized persons was held not to be a facial violation of the Establishment Clause in *Cutter v. Wilkinson*. 544 U.S. 709 (2005). Justice Thomas has expressed a concern that RLUIPA "may well exceed Congress' authority under either the Spending Clause or the Commerce Clause." *Cutter*, 544 U.S. 709, n.2. *See also* Mayweathers v. Newland, 314 F.3d 1062, 1066 (9th Cir. 2002), *cert. denied sub nom*. Alameida v. Mayweathers, 540 U.S. 815 (2003) (holding RLUIPA constitutional exercise of Congressional spending power in a case involving prison inmates). Much of the litigation interpreting RLUIPA deals with claims by institutionalized persons. Those cases are not addressed in this paper.

19. Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 353-56 (2nd Cir. 2007) holding RLUIPA's land use provisions are within Congressional power under the Commerce Clause, and do not violate either the Tenth Amendment nor the Establishment Clause); Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 981 (9th Cir. 2006); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1239-43 (11th Cir. 2004); San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004);. *See also* Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 315-16 (D. Mass. 2006); U.S. v. Maui County, 298 F. Supp. 2d 1010 (D. Ha. 2003) (upholding constitutionality of RLUIPA in challenge to denial of special use permit); Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056 (D. Ha. 2002); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1221 (C.D. Cal. 2002); Freedom Baptist Church v. Township of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002). The district court in *Elsinore Christian Center v. City of Lake Elsinore* held the act invalid as exceeding the remedial powers under the Fourteenth Amendment and unjustified under the Commerce Clause. 291 F. Supp. 2d 1083, 1096–1104 (C.D. Cal. 2003), *rev'd*, 197 Fed. Appx. 718 (9th Cir.2006), *cert. dismissed*, 128 S.Ct. 6 (2007).

## 2. Governmental Actions Subject to RLUIPA

RLUIPA is applicable only to land use regulations and the treatment of institutionalized persons. Most of the challenged regulations involve traditional zoning requirements, such as use restrictions, height and bulk rules for structures, impervious surface limits, and the like. Courts have also held closely related regulations (such as off-street parking requirements[20] and sign regulations[21]) to be within the "land use regulations" subject to RLUIPA.

Nonregulatory decisions do not come within the purview of potential protection under this statute. A variety of nonregulatory governmental actions that have a land use impact have been held not to be subject to this law. These include involuntary annexation,[22] use of eminent domain,[23] and road closing decisions.[24]

The entity claiming a RLUIPA violation must own or have a property interest in the regulated land.[25]

## 3. Defining "Religious Exercise"

RLUIPA is applicable to land use regulations that impose a substantial burden on the religious exercise of a person, including a religious assembly or institution. The law is clearly

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On appeal, the district court was reversed on the ground that the unconstitutionality contention had been rejected in *Guru Nanak Sikh Society*.

20. *See, e.g.*, Lighthouse Community Church of God v. City of Southfield, 2007 WL 30280 (E.D. Mich. 2007).

21. Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 962 A.2d 404 (Md. 2008). There are of course limits. *See, e.g.*, Edina Cmty. Lutheran Church v. Minnesota, 745 N.W.2d 194, 212-13 (Minn. Ct. App. 2008) (state law limiting churches' ability to prohibit having guns in their buildings and parking areas is not a land use regulation subject to RLUIPA review).

22. Vision Church v. Village of Long Grove, 468 F.3d 975, 997-98 (7th Cir. 2006) (RLUIPA is not applicable to involuntary annexation decision).

23. St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 639-42 (7th Cir. 2007) (condemnation of cemetery on church property for expansion of O'Hare Airport is not a land use regulation subject to RLUIPA); Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254 (W.D. N.Y. 2005) (use of eminent domain to acquire a site for parkland that was desired by the adjacent church for expansion purposes not subject to RLUIPA);.City and County of Honolulu v. Sherman, 129 P.3d 542, 547 (Ha. 2006).

24. Prater v. City of Burnside, 289 F.3d 417, 434 (6th Cir. 2002) (RLUIPA not applicable to decision on opening or closing a roadway).

25. *See, e.g.*, Taylor v. City of Gary, 233 Fed.Appx. 561 (7th Cir. 2007) (dismissing claim by pastor who wanted city to donate vacant city-owned church building to him as the pastor had no property rights in that structure).

applicable to places housing assembly for worship, but the question arises as to the extent ancillary activities are included within the protected "religious exercise."

The courts have generally held that associated activities such as a parish house,[26] outreach center,[27] or day care facilities,[28] and schools that incorporate religious instruction are included. Likewise, social outreach and mission activities, such as soup kitchens, homeless shelters,[29] hospitals,[30] and crisis centers[31] have been held to be included. Not all activity undertaken by a religious entity is "religious exercise" simply by dent of its sponsorship. Buildings used by religious organizations for secular activities or to generate revenue to finance religious activities are not covered. For example, the Michigan court held the construction of an apartment building by a church did not fall within "religious exercise" protected by RLUIPA.[32]

**4. Defining "Substantial Burden"**

In many respects the critical question in assessing a RLUIPA or First Amendment claim is the threshold inquiry of whether or not the challenged regulation substantially burdens[33] the

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26. *See, e.g.*, Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 318-19 (D. Mass. 2006).

27. *See, e.g.*, Chabad of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280 (S.D. Fla. 2008).

28. *But see* Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park Borough, 920 A.2d 953, 960 (Pa. Cmwlth. 2007) (lack of daycare had *de minimus* impact on religious exercise).

29. *See, e.g.*, Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 987 (N.D. Ill. 2008).

30. In Sisters of St. Francis Health Services, Inc., v. Morgan County, the court assumed without deciding that expansion of a hospital was in furtherance of the religious entity's healing mission and thus constituted religious expression. 397 F. Supp. 2d 1032, 1050 (S.D. Ind. 2005) (holding requirement to seek county approval for hospital expansion was not a substantial burden).

31. *See, e.g.*, Men of Destiny Ministries, Inc. v. Osceola County, 2006 WL 3219321 (M.D. Fla. 2006).

32. Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734,745-46 (Mich. 2007). *See also* Scottish Rite Cathedral Ass'n of Los Angeles v. City of Los Angeles, 67 Cal.Rptr.3d 207 (Ca. Ct. App. 2008) (while Masonry may qualify as religion, rental of cathedral for all events, including commercial ones, is not protected religious exercise).

33. For general case law defining the substantial burden test in a First Amendment context, see Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988) (a substantial burden is one that coerces persons into acting contrary to their religious beliefs); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) (a substantial burden is more than an incidental effect that makes religious practice more difficult); Sherbert v. Verner, 374 U.S. 398, 403 (1963); Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (not a substantial burden if law simply makes the practice of religious beliefs more expensive); Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006).

free exercise of religion. If the burden imposed is not substantial, there is no potential statutory violation. Given the similarity of the tests involved on this issue in First Amendment, RFRA, and RLUIPA cases, there is a fair amount of case law on this issue. [34]

The substantial burden test is only applicable when the government is making 'individualized assessments of the proposed uses for the property involved." [35] There is judicial disagreement as to whether typical zoning restrictions are uniform laws of general application[36] or are inherently individualized determinations[37] applicable to specific parcels and particular users. An application of land use regulations that involves application of discretionary standards,[38] such as determining a special or conditional use permit application, is clearly an individualized determination. But when examining a decision to deny a rezoning or a variance petition, should the focus be on the initial general zoning rules applicable to the land or on the individualized decision on whether to change or vary the rules for a particular site? Courts are split on this question. For example, the Michigan court held a rezoning petition is not an individualized assessment in a RLUIPA context[39] while the Maryland court noted a variance petition is a classic individualized determination.[40] One resolution that appears to be gaining favor is to make a fact-specific inquiry rather than setting bright-line categorizations. [41] This approach asks whether the regulation and its application were motivated by discriminatory

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34. A number of courts have applied the pre-*Smith* case law defining a "substantial burden" in application of RLUIPA and RFRA. Marria v. Broaddus, 200 F. Supp. 2d 280, 298 (S.D. N.Y. 2002). For a collection of cases applying the substantial burden test under RFRA, see Hicks v. Garner, 69 F.3d 22, 26 n.22 (5th Cir. 1995). There are modest differences in the two statutory and the constitutional provisions. *See* Navajo Nation v. U. S. Forest Service, 479 F.3d 1024, 1033 (9th Cir. 2007), *aff'd* 535 F.3d 1058 (9th Cir. 2008). However, the legislative history of RLUIPA indicates a legislative intent that the Free Exercise jurisprudence should be referenced in defining "substantial burdens" and many courts have done so. *See, e.g*., Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 348 (2nd Cir. 2007).

35. 42 U.S.C. 2000cc(a)(2). The Connecticut court noted that the focus on individualized determinations is necessary to avoid conflict with the *Smith* rule that uniform laws of general application need not have a religious exemption. Cambodian Buddhist Soc'y of Conn. v. Planning and Zoning Comm'n of Newtown, 941 A.2d 868, 890-92 (Conn. 2008).

36. *See, e.g*., Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 987 (9th Cir. 2006); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764 (7th Cir. 2003).

37 .*See, e.g*., Konikov v. Orange County, 410 F.3d 1317, 1323 (11th Cir. 2005) Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1225 (11th Cir. 2004).

38. *See, e.g*., Corp. of the Presiding Bishop v. City of W. Linn, 86 P.3d 1140, 1148 (Or. Ct. App. 2004).

39. Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 742-44 (Mich. 2007).

40. Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 962 A.2d 404, 426 (Md. 2008).

41. Lighthouse Inst. For Evangelism, Inc, v. City of Long Branch, 510 F.3d 253, 277 (3rd Cir. 2007); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 651 (10th Cir. 2006);

animus or motivated by secular purposes? Was it applied in a way that disadvantages religious groups or equally to all land owners?

*Locational Restrictions*

Many courts have held that typical zoning restrictions on the location of particular religious uses do not impose a substantial burden if reasonable alternative locations in the jurisdiction are permissible.[42] However, the specific facts of a case are particularly important in this determination.

A typical restriction is to limit the location of places of worship in residential areas. In *Grace United Methodist Church v. City of Cheyenne*[43] the court upheld the city's refusal to grant a variance for the church's proposed 100-child day care center in a low density residential neighborhood. The court in *San Jose Christian College v. City of Morgan Hill*[44] upheld the city's refusal to rezone an area zoned for low density multi-family housing in order to allow a religiously affiliated college campus. The court applied narrow definition of substantial burdens, holding that restriction of places of worship to particular zoning districts and refusals to rezone

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42. In addition to alternate locations, sometimes alternatives for conducting the religious exercise are an important factor. In *City of Woodinville v. Northshore United Church of Christ* the court held the city's denial of approval of a tent city as a temporary encampment for homeless persons was not a substantial burden because the church had not demonstrated it could not effectively minister to the homeless in an indoor setting or that alternative sites were not available. 162 P.3d 427, 436-37 (Wash. Ct. App. 2007).

43. 451 F.3d 643 (10th Cir. 2006). The proposed day care center would have operated eighteen hours per day, seven days per week and would have been open to the public regardless of religious affiliation. The zoning ordinance limited day care facilities in this zone to those serving twelve or fewer children. *See also* Redwood Christian Schools v. County of Alameda, 2007 WL 781794 (N.D. Cal. 2007) (denial of conditional use permit for a 650-student school held to not be an unreasonable limitation under RLUIPA where denial based solely on impacts on the land and neighborhood, without consideration of religious orientation of school and other sites, existed within jurisdiction for school siting).

44. 360 F.3d 1024, 1033–36 (9th Cir. 2004) (denial of rezoning for religious education use not a substantial burden where alternative sites within city were available). The city had previously approved a conditional use permit for a hospital on the site. The court also noted a denial based on an incomplete application is not a substantial burden. *See also* Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) (upholding denial of conditional use permit for alternative location for synagogue, holding inconveniences and distractions to worshippers that can be addressed in current location do not constitute a substantial burden); Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004) (denial of permit to demolish historic building in order to construct a larger building held not to be a substantial burden); Vineyard Christian Fellowship v. City of Evanston, 250 F. Supp. 2d 961, 991–93 (N.D. Ill. 2003) (limitations on religious uses in zoning district not a substantial burden, but regulation held to violate Equal Protection Clause); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 761 N.W.2d 230 (Mich. App. 2008) (denial of variance to allow to allow faith-based school in office park zoning district not a substantial burden given alternative sites, even though substantial evidence of prohibitive costs of alternatives).

property for religious uses did not impose an impermissible substantial burden on religious exercise. In pre-RLUIPA case, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*,[45] the court upheld an ordinance that prohibited the construction of churches in most of the city's residential zoning districts. Churches were allowed only in some multifamily residential and business districts, which comprised some 10 percent of the city land area. The court held that there was not a substantial burden on religious practices because the ordinance did not prohibit construction, but only restricted the particular sites available to the congregation.[46] In *Grosz v. City of Miami Beach*,[47] a leading pre-*Smith* case, the court applied a similar analysis and result. The court upheld a zoning enforcement action taken to prohibit an elderly rabbi from conducting religious services in a converted garage adjacent to his house. The property was in a single-family zoning district. Churches were prohibited in that district but allowed as permitted uses in all other zoning districts. The court found that the interest in protecting residential neighborhoods from the impacts of institutional uses was important and the burden on the petitioner to move his religious services to an appropriate zoning district was not substantial, since half the city (including an area only four blocks away from the plaintiff's house) freely allowed religious institutions.

In other instances the land use regulations limit non-commercial uses, including religious uses, in commercial, industrial, or office areas in order to promote economic development.[48] In an influential case interpreting the scope of RLUIPA's substantial burden test, the court in *Civil Liberties for Urban Believers v. City of Chicago*[49] (*CLUB*) held that Chicago's land use

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45. 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983).

46. *Id*. *See also* Johnson v. Caudill, 475 F.3d 645 (10th Cir. 2006) (noting wide range of other zoning districts within which church could operate day care facility).

47. 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984). *See also* Christian Gospel Church, Inc. v. City and County of San Francisco, 896 F.2d 1221 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989) (upholding denial of approval to build a church in an agricultural zone). A zoning provision that closed a homeless shelter being operated as an accessory use by a church was upheld on the basis that the burden on the church to move the shelter to an appropriate zoning district was less than the burden on the county if it were forced to allow the shelter to operate in violation of the ordinance. First Assembly of God of Naples, Fla., Inc. v. Collier County, 27 F.3d 526 (11th Cir. 1994), *cert. denied*, 513 U.S. 1080 (1995). For other cases applying a similar balancing analysis, *see, e.g.*, Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995); Church of Jesus Christ of Latter-day Saints v. Jefferson County, 741 F. Supp. 1522 (N.D. Ala. 1990).

48. In addition to the issue of whether such limitations to commercial uses impose a substantial burden on religious uses, these regulations also raise issues of equal treatment if secular commercial uses similar to religious uses are permitted. Cases raising this issue are noted in the "Equal Terms" section of this paper below.

49. 342 F.3d 752, 759–62 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004). *See also* Petra Presbyterian Church v. Village of Northbrook, 409 F. Supp. 2d 1001, 1007 (N.D. Ill. 2006) (prohibition of churches in industrial zoning district not a substantial burden under RLUIPA);. There are similar pre-RLUIPA holdings. *See, e.g.*, Cornerstone Bible Church v. City of Hastings,

restrictions for places of worship did not violate RLUIPA or the constitution. The challenged zoning ordinance allowed places of worship by right in all residential districts (which included the majority of land available for development) but required a special use permit in commercial districts and a rezoning in manufacturing districts. The court held that to constitute a substantial burden, the restriction must "bear[] direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impractical."[50] In *Midrash Sephardi, Inc. v. Town of Surfside*[51] the challenged ordinance prohibited places of worship within a two-block business district. The court held that "reasonable 'run of the mill' zoning considerations" (such as locating places of assembly outside of residential areas and addressing the size, congruity with existing nearby uses, and parking availability for a proposed land use) are not a substantial burden as there must be more than a "inconvenience" on religious exercise.

*Dimensional Restrictions*

Other nondiscriminatory routine land use regulations on religious uses are typically upheld.

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948 F.2d 464 (8th Cir. 1991). The challenged regulation excluded churches as incompatible with revitalization of a central business district. The court remanded the case for additional findings under a traditional content-neutral time, place, and manner regulation of speech analytic framework (e.g., adequacy of studies relative to adverse secondary impacts of church location in the commercial district). *See also* Love Church v. City of Evanston, 896 F.2d 1082 (7th Cir. 1990); International Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878 (N.D. Ill. 1996) (denial of special use permit to locate a church in a vacant commercial building did not constitute a substantial burden because churches were a permitted use in more than 60 percent of the city); Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996).

50. Civil Liberties for Urban Believers v. City of Chicago 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004).

51. 366 F.3d 1214, 1227 (11th Cir. 2004). The court went on to note that to be impermissible, the burden must be "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly" or to "force adherents to forego religious precepts . . . ." *Id*. *See also* Hollywood Community Synagogue, Inc. v. City of Hollywood, 430 F. Supp. 2d 1296, 1317-19 (S.D. Fla. 2006) (prohibition on holding services in residentially zoned areas where there are other areas suitably zoned is not a substantial burden under RLUIPA, but showing of substantial burden not required if unequal treatment is established); Corp. of Presiding Bishop v. City of W. Linn, 111 P.3d 1123 (Or. 2005) (requirement that conditional use permit application be revised to provide larger buffers between proposed meetinghouse and adjacent single-family residential area not a substantial burden under RLUIPA). In *Hollywood Community Synagogue, Inc. v. City of Hollywood*, the plaintiff did secure relief on constitutional grounds. 436 F. Supp. 2d 1325 (S.D. Fla. 2006). *See also* Tran v. Gwinn, 554 S.E.2d 63, 67 (Va. 2001) (requirement of special use permit for places of worship in a residential conservation zone is only a minimal and incidental burden of free exercise of religion); Open Door Baptist Church v. Clark County, 995 P.2d 33 (Wash. 2000) (requiring a church in a rural estate zoning district to obtain a conditional use permit is a permissible incidental burden on free exercise of religion).

For example, a requirement that within a rural-agricultural zoning district all nonagricultural, nonresidential uses be separated by at least 1,000 feet from existing agricultural and residential uses was upheld in *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*.[52]

Likewise, limitations on the size and height of buildings used for religious uses have been held not to impose a substantial burden.[53] Refusal to grant a variance to allow a much larger and taller sign than otherwise allowed by the ordinance has been held not to be a substantial burden.[54]

*Process Requirements*

The cost and procedural difficulty inherent in securing special use permits and other regulatory approvals have been held not to impose a substantial burden.[55] In *CLUB* the court

52. 450 F.3d 1295 (11th Cir. 2006).

53. *See, e.g.*, Vision Church v. Village of Long Grove, 468 F.3d 975, 999-1000 (7th Cir. 2006) (55,000 square foot size limit on church not a substantial burden); Living Water Church of God v. Charter Twp. of Meridian, 258 Fed.Appx. 729, 736-41 (6th Cir. 2007) (not a substantial burden where township issued special use permit for a religious school but denied permit amendment to expand school beyond 25,000 sq. ft.); Episcopal Student Found. v. Ann Arbor, 341 F. Supp. 2d 691, 707 (E.D. Mich. 2004) (denial of permit to build a larger structure not a substantial burden); Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 953 P.2d 1315 (Ha. 1998) (height limit on temple not a substantial burden). *See also* Love Church v. City of Evanston, 896 F.2d 1082, 1086 (7th Cir. 1990).

54. Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 962 A.2d 404, 428-30 (Md. 2008).

55. Vision Church v. Village of Long Grove, 468 F.3d 975, 990-91 (7th Cir. 2006) (requirement that church secure a special use permit does not in and of itself unreasonably limit religious assembly); Konikov v. Orange County, 410 F.3d 1317, 1323-24 (11th Cir. 2005) (requirement to obtain a special use permit before operating a "religious organization" in a residential zoning district is not a substantial burden). *See also* Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 986-88 (N.D. Ill. 2008) (requirement to secure a special use permit for a homeless shelter in downtown commercial zoning district not a substantial burden); Christian Methodist Episcopal Church v. Montgomery, 2007 WL 172496 (D. S.C. 2007) (requirement to seek rezoning or conditional use permit not a substantial burden under RLUIPA); Men of Destiny Ministries, Inc. v. Osceola County, 2006 WL 3219321 (M.D. Fla. 2006) (requirement that religiously-based drug treatment home secure conditional use permit not a substantial burden under RLUIPA); Sisters of St. Francis Health Services, Inc. v. Morgan County, 397 F. Supp. 2d 1032, 1050-51 (S.D. Ind. 2005) (requirement that proposed hospital expansion submit permit applications not a substantial burden under RLUIPA); Tran v. Gwinn, 554 S.E.2d 63 (Va. 2001) (upholding ordinance requiring special use permit for places of worship in residential zoning district). *But see* Grace Church of North County v. City of San Diego, 555 F. Supp. 2d 1126, 1136-38 (S.D. Cal. 2008) (conditional use permit process requiring referral to lay planning board for recommendation is a substantial burden, especially given hostility of board to religious use in industrial area).

noted that the additional costs of securing special use permits or rezonings did not make location of places of worship in the city impractical, and thus there was not a substantial burden on religious exercise under the act.

*Substantial Burden Found*

Some cases have, however, found land use regulations to impose a substantial burden. *Westchester Day School v. Village of Mamaroneck*[56] involved an application to modify a special use permit in order to allow construction of a new classroom at an existing religious school in a residential zoning district. The court noted that while the neutral application of legitimate land use regulations may well not be a substantial burden, if the regulation is imposed arbitrarily, capriciously or unlawfully, that may reflect bias or discrimination against religion and thus a substantial burden under RLUIPA.[57] The court Circuit in *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*[58] found that the city's refusal to rezone (based on a concern that other institutional uses might locate on the site) posed a substantial burden under RLUIPA. There was, as in the *Westchester Day School* case, some indication that other than legitimate land use considerations were at play in the city's decisions. The court found the church had submitted multiple applications and modified its proposal to address municipal concerns, yet the city had engaged in deliberate and unjustified delay. In *Guru Nanak Sikh*

56. 504 F.3d 338 (2nd Cir. 2007). The court noted that the protection afforded by RLUIPA to the religious aspects of a use do not extend to the secular portions of the use. Examples cited as not being subject to RLUIPA review were construction of a gymnasium or sporting activities, a headmaster's residence, or school office space, as these do not constitute "religious exercise" even when constructed by a religious school. Id. at 347-48.

57. Id. at 350-51. The court also noted that the lack of other non-construction alternatives available to allow the school to meet its religious needs and the village's unconditional denial were also factors in a finding of substantial burden.

58. 396 F.3d 895 (2005). *See also* Reaching Hearts International, Inc. v. Prince Georges's County. 584 F. Supp. 2d 766, 784-87 (D. Md. 2008) (denials of water and sewer use area designation amendments, denial of lot recombination, and increases in impervious surface limits effectively precluded development of property); Grace Church of North County v. City of San Diego, 555 F. Supp. 2d 1126, 1136-38 (S.D. Cal. 2008) (provisions in conditional use permit limiting church use in industrial area to five years constituted substantial burden); Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 319-23 (D. Mass. 2006) (maximum building lot coverage limitation that precluded building parish center as an accessory building to existing church imposes a substantial burden); Elsinore Christian Center v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1088–96 (C.D. Cal. 2003) (denial of a conditional use permit for relocation of a church in a downtown district violated the strict scrutiny requirements of RLUIPA); Cottonwood Christian Center v. Cypress Redev. Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (enjoining city action to acquire vacant parcel for commercial redevelopment after denial of conditional use permit for a 4,700-seat church facility on the site); Alpine Christian Fellowship v. County Commissioners of Pitkin County, 870 F. Supp. 991 (D. Colo. 1994) (restricting establishment of a religious school within an existing permitted church building held to be a substantial burden and that traffic concerns and neighborhood compatibility were not compelling grounds for denial).

*Society of Yuba City v. County of Sutter*[59] the court held that the denial of initial application for a conditional use permit for a temple on a small tract within the city and denial of second conditional use permit application for a rural site zoned for agricultural use constituted a substantial burden without a compelling governmental interest.

In reconciling the *CLUB* and these cases finding a substantial burden, a significant factor in each was the court's conclusions as to the reasonable and nondiscriminatory application of land use rules. Where the local action is seen as arbitrary or not fully supported by legitimate land use factors, the courts are sensitive to potential religious discrimination as an unstated basis of the outcome. It is significant that in the cases finding a substantial burden, either the professional planning staff recommended approval of the application or the evidence supporting a denial was simply not in the record. Conditions can also be an important factor in this analysis. In *Sts. Constantine and Helen*, the applicant had agreed to every mitigation condition proposed by the staff, while in *Westchester Day School* no mitigating conditions were even offered by the village. Also, the application of a high degree of discretion inherent in a rezoning has a greater potential for masking religious discrimination than does a special or conditional use permit with clearly bounded discretion and the requirement for evidence and findings to support the decision.[60]

In a case that received national attention, the court in *Murphy v. Zoning Commission of New Milford*[61] held an order limiting attendance at prayer meetings in a residence to be unlawful. The town had issued a cease and desist order under its zoning ordinance to prohibit attendance by more than twenty-five persons who were not family members at regularly scheduled prayer meetings in a residence. The court held that the order violated both RLUIPA and the Free Exercise Clause (using a *Lukumi* analysis). The court also noted that the restriction could have been more narrowly tailored to specifically address parking and traffic concerns. However, the court of appeals subsequently held that the case was not ripe, as the homeowners had not sought a variance, which would have stayed all enforcement actions until a decision was made on the variance petition.[62]

### 5. Defining a "Compelling State Interest"

Most land use regulations of religious uses have a legitimate secular basis[63] and are routinely upheld as such. Examples include concerns about traffic and parking impacts, property

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59. 456 F.3d 978. *But see* Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989) (upholding prohibition of substantial church complex in a rural area).

60. For a discussion of these factors, see *Timberline Baptist Church v. Washington County*, 154 P.3d 759, 211 Ore. App. 437 (2007) (finding denial of special use permit for parochial school proposed to be adjacent to permitted church and day care did not impose substantial burden under RLUIPA).

61. 289 F. Supp. 2d 87 (D. Conn. 2003).

62. Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005).

63. In *First Assembly of God v. City of Alexandria*, the court upheld conditions in a special use permit that limited enrollment in a church day school to preschool through ninth grade and

value impacts, land use compatibility,[64] adequacy of utilities, revitalization of commercial areas,[65] health and safety concerns,[66] or preservation of historic and aesthetic attributes of a community.[67]

However, *if* the regulation imposes a substantial burden, under RLUIPA a more exacting compelling interest must be established. In non-land use contexts, regulations of religiously based conduct that have been upheld have generally addressed conduct that "invariably posed some substantial threat to public safety, peace or order."[68] For example, prohibition of religiously motivated but dangerous activity, such as handling poisonous snakes, has long been allowed.[69]

Typical land use concerns such as traffic congestion, neighborhood compatibility, and preservation of neighboring property values rarely rise to the level of a compelling state interest.[70] A land use denial that is made primarily to satisfy the opposition of a small group of neighbors is the classic example of a justification that is not compelling.[71] Courts are split on

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required erection of a fence and a landscaped buffer between the school and the surrounding neighborhood, finding these restrictions had a strictly secular purpose. 739 F.2d 942 (4th Cir.), *cert. denied*, 469 U.S. 1019 (1984).

64. *See, e.g.*, Christian Gospel Church, Inc. v. City & County of San Francisco, 896 F.2d 1221 (9th Cir. 1990), *cert. denied*, 498 U.S. 999 (1990) (upholding denial of a conditional use permit for a church in a residential zoning district); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989) (upholding prohibition of substantial church complex in a rural area).

65. *See, e.g.*, International Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878 (N.D. Ill. 1996) (upholding the denial of a permit to locate a church in a vacant department store based on the city's need to preserve the area for commercial revitalization).

66. *See, e.g.*, Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984) (upholding a Ramapo, New York, requirement for zoning compliance as applied to a religious nursery school being operated by a synagogue). The court applied a balancing test and concluded that public fire safety regulations justified even a substantial burden on religious practices.

67. *See, e.g.*, St. Bartholomew's Church v. N. Y., 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

68. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

69. *See, e.g.*, State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed*, 336 U.S. 942 (1949).

70. *See, e.g.*, Reaching Hearts International, Inc. v. Prince Georges's County. 584 F. Supp. 2d 766, 787-89 (D. Md. 2008) (alleged harm to water supply reservoir and water quality generally not supported by evidence); Mintz v. Roman Catholic Bishop of Springfield, 424 F.Supp2d 309, 323-24 (D. Mass. 2006) (building setback and lot coverage limitations are not compelling interests).

71. Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 354 (2nd Cir. 2007).

whether combating urban blight is a compelling interest.[72] Building regulations on fire safety and similar concerns would be a compelling state interest.[73]

If similar secular uses are not being similarly regulated or there are exemptions for non-religious uses in a regulation, that would also certainly undercut an argument that there is a compelling need for the regulation. For example, when a city contends the denial of a conditional use permit for a church in an industrial district is justified by a compelling governmental interest in preservation of land for industrial uses, that logic is fatally undercut by a decision not to eliminate all non-industrial uses as potential uses in that zoning district.[74] The discussion of cases under the "Equal Terms' section below can also be relevant for this analysis.

### 6. Employing the "Least Restrictive Means"

If a land use regulation imposes a substantial burden in addressing a compelling state interest, the regulation must be crafted to employ the least restrictive means of addressing that interest.

Particular attention should be given to the question of whether there are alternative measures available that allow the religious exercise while adequately addressing the state interest. For example, a zoning ordinance that prohibited all places of worship throughout the entire jurisdiction would be invalid, but a more carefully targeted zoning restriction (for example, one that restricted places of worship seating more than 200 persons to particular zoning districts or sites fronting adequate roads) would likely be acceptable.

For individual sites, a key question is whether there are conditions or particularized mitigation measures that could be imposed to allow the religious expression while protecting legitimate public interests.

### 7. Treating Religious Land Uses on "Equal Terms"

A regulation restricting religious uses must also be applied to secular land uses with similar land use impacts. A zoning restriction that prohibits a religiously sponsored soup kitchen while permitting an adjacent commercial restaurant would raise serious questions about whether there was in fact a legitimate secular purpose for the restriction.[75] It is impermissible under

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72. *Compare* Cottonwood Christian Ctr. v. City of Cypress, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002) (revenue generation not a compelling interest) *with* Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507, 516 (D. N.J. 2006) (economic revitalization of city center is a compelling interest).

73. *See, e.g.*, Peace Lutheran Church & Academy v. Village of Sussex, 631 N.W.2d 229 (Wis. Ct. App. 2001) (upholding requirement for a fire sprinkler system in a church building challenge under state constitutional provision on free exercise).

74. Grace Church of North County v. City of San Diego, 555 F. Supp. 2d 1126, 1140-41 (S.D. Cal. 2008).

75. There is a split among the circuits as to whether the Equal Terms protection of RLUIPA requires a strict scrutiny review. Lighthouse Inst. for Evangelism, Inc. v. City of Long Beach,

RLUIPA to treat a religious land use more strictly than a comparable nonreligious one. If there is unequal treatment, there is a RLUIPA violation even if there is not a substantial burden on the religious exercise as this is an independent protection under the Act.[76]

It has been held to be a RLUIPA violation to prohibit places of worship in a commercial district that allows other similar nonprofit uses, such as private clubs and lodges. In *Midrash Sephardi, Inc. v. Town of Surfside*[77] the ordinance prohibited places of worship within a two-block central business district, but allowed theaters, restaurants, and private clubs. The court reasoned that if places of secular assembly are allowed, places of religious assembly must be allowed as well.[78] In *Digrugilliers v. Consolidated City of Indianapolis*[79] the court considered an Indianapolis ordinance that required a variance for churches in C-1 Office-Buffer district, but allowed a wide variety of similar uses without a variance (including assembly halls, citizen centers, civic clubs, schools, and various assisted living facilities). The district court denied the church's petition for a preliminary injunction, but the Seventh Circuit court remanded the case for further balancing of the parties' interests. The court noted the potential violation of equal treatment. The city had offered two rationales for the disparate treatment. First, the city noted a church could include a rectory as an accessory use, thereby allowing a residential use that was not allowed for the other permitted uses. Second, the court noted other permitted uses in the district could include the sale of alcohol or pornography, both of which would be prohibited within 200 feet of a church. The court held neither rationale could justify disparate treatment.

This presents the issue of how similar the permitted secular use must be to the prohibited religious use in order to invoke the "Equal Terms" provision of RLUIPA. In *Lighthouse Institute for Evangelism, Inc. v. City of Long Beach*,[80] the city adopted a redevelopment plan and limited

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510 F.3d 253, 269 (3rd Cir. 2007) (strict scrutiny not required); Primera Iglesia Bautista Hispana of Boca Raton, 450 F.3d 1295, 1308 (11th Cir, 2006) (strict scrutiny required).

76. Lighthouse Inst. for Evangelism, Inc. v. City of Long Beach, 510 F.3d 253, 264 (3rd Cir. 2007); Konikov v. Orange County, 410 F.3d 1317, 1327-29 (11th Cir. 2005); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229-35 (11th Cir. 2004); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762 (7th Cir. 2003).

77. 366 F.3d 1214. *See also* Vision Church v. Village of Long Grove, 468 F.3d 975, 1003 (7th Cir. 2006) (analogous secular use need not be comparable in all relevant respects); Konikov Orange County, 410 F.3d 1317, 1327-29 (11th Cir. 2005) (may not prohibit religious assembly where comparable secular civic assembly is allowed); Vietnamese Buddhism Study Temple in America v. City of Garden Grove, 460 F. Supp. 2d 1165, 1174 (C.D. Cal. 2006) (preliminary injunction halting ordinance enforcement appropriate under RLUIPA where ordinance allows private clubs and other secular assemblies by right but requires religious assemblies to secure conditional use permit).

78.S*ee also* Hollywood Community Synagogue, Inc. v. City of Hollywood, 430 F. Supp. 2d 1296, 1319-21 (S.D. Fla. 2006) (RLUIPA violated if comparable nonreligious assemblies and institutions are allowed in a residential district while religious assembly is prohibited or if there is discrimination between religious affiliations).

79, 506 F.3d 612, 616 97th Cir. 2007).

80. 510 F.3d 253 (3rd Cir. 2007).

land uses in a designated redevelopment area to those supporting a regional commercial/entertainment district. It allowed theaters, cinemas, and schools for culinary, dance, music, theater, fashion design, and art. Restaurants, bars, and specialty retail were allowed as secondary uses. Churches, schools, and government buildings were not permitted. The court held the key question is whether the comparable uses are similarly situated as to the regulatory purpose of the ordinance in question. The relevant comparison must be between the religious use and an analogous secular use that has a similar impact on the regulation's objectives. In this case, the redevelopment plan's objective was to limit uses to those that would support a vibrant commercial center. The simple fact that some of the permitted uses included places of assembly was not the relevant consideration. Rather, the inquiry is whether a principled distinction can be made as to whether the permitted and prohibited uses supported or detracted from the legitimate governmental objective.

It is also important to note that different outcomes on permit decisions for similar religious and secular uses do not in and of itself constitute disparate treatment. If there are relevant factual differences in the applications, they are not similarly situated for the "Equal Terms" analysis.[81]

If similarly situated or comparable religious and secular uses are treated differentially, that would also raise due process[82] and equal protection[83] objections. It is difficult for plaintiffs to successfully challenge land use regulations on equal protection grounds for a variety of reasons, not the least of which is that the plaintiff must show intentional or purposeful discrimination, not just disparate impacts.[84] Though rare, this is occasionally established in religious land use cases. An example is *Reaching Hearts International, Inc. v. Prince Georges's County*.[85] The plaintiff Seventh Day Adventist congregation bought an appropriately zoned rural

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81. If there is no evidence to establish a reasonable inference that the disparate treatment of applications for approval of a homeless shelter was based on the religion, there is no RLUIPA claim. Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 989-90 (N.D. Ill. 2008). In this case the city offered numerous factual differences in the two applications and the church offered no evidence of a difference based on religious discrimination.

82. *See, e.g.*, Catholic Bishop of Chicago v. Kingery, 20 N.E.2d 583 (Ill. 1939) (prohibition of parochial school in zoning district that allows public schools is capricious and invalid).

83. Chabad of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280, 1291-94 (S.D. Fla. 2008) (exclusion of religious assemblies from business district while allowing schools and personal improvement centers violates equal protection); Open Homes Fellowship, Inc. v. Orange County, 325 F. Supp. 2d 1347 (M.D. Fla. 2004) (denial of permit for group home housing faith-based substance abuse program, while allowing other group homes by right in same zoning district, has no rational basis and violates both due process and equal protection); Vineyard Christian Fellowship v. City of Evanston, 250 F. Supp. 2d 961, 975–79 (N.D. Ill. 2003) (ordinance prohibiting religious institutions from conducting services in zoning district while allowing cultural and membership organizations violates Equal Protection Clause).

84. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). A purposeful animus towards an individual landowner can be sufficient to establish the requisite intent to improperly discriminate. Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

85. 584 F. Supp. 2d 766 (D. Md. 2008).

parcel for a proposed church. In a series of actions, however, the county elected officials refused to adjust the property's classification under state-mandated water and sewer use plans, refused to allow combination of two adjoining parcels owned by the church, and substantially reduced the amount of impervious surface coverage allowed on the lot. Substantial evidence was presented at hearing, and a jury found, that these actions were motivated by religious discrimination. The evidence included a consistent and contemporaneous approval of all other similar requests while this one applicant was consistently denied, overruling staff recommendations without any evidence of a legitimate land use basis for doing so, and statements of animus towards the religious applicant at the hearing by both members of the public and at least one elected official.[86] Therefore to the extent there is differential treatment for places of religious assembly, it is incumbent upon the local government to establish that this is being done to address legitimate differential land use impacts.

Another question presented by a standard of uniform application of regulations is how far a local government can go in exempting religious uses from otherwise uniform regulations, such as exempting a church message board from sign regulations. A degree of accommodation of religious practices by way of exemption is permissible.[87] For example, the federal government exempted sacramental use of wine from the general ban on alcohol use during the Prohibition. In *Smith*, Justice Scalia noted that the Oregon legislature could choose to exempt sacramental use of peyote from state criminal sanctions.[88] However, an exemption that is overly broad may well raise a question as to the legitimacy of the avowed secular purpose of the regulation. Local governments should establish a record that an exemption will not significantly undermine the secular purposes of the regulation.

Exemptions come with an additional concern: Do they violate the Establishment Clause by improperly favoring a religious use over a secular use with similar land use impacts? Justice Stevens' concurring opinion in *Boerne* expressed the view that exemption of a religious use from

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86. For a statement of the evidence that can establish an intent to discriminate, see Sylvia Dev. Corp. Calvert County, 48 F.3d 810, 819 (4th Cir. 1995).

87. Ehlers-Renzi v. Connelly School of the Holy Child, Inc., 224 F.3d 283 (4th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001) (upholding ordinance that exempted parochial schools from special use permit requirements); Boyajian v. Gatzunis, 212 F.3d 1 (1st Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (upholding Massachusetts statute that forbade municipal zoning from excluding religious and educational uses from any zoning district). These cases generally employ the Establishment Clause analysis of *Lemon v. Kurtzman* to find that the exemptions serve a secular purpose rather than advancing or endorsing religion. 403 U.S. 602 (1971). A classic example is *Larkin v. Grendel's Den, Inc*. 459 U.S. 116 (1982). The Court invalidated on Establishment Clause grounds a Massachusetts statute giving churches veto power over liquor license applications for facilities within 500 feet of churches. The Court noted it would have been permissible to simply ban all establishments serving alcohol within a set distance of sensitive land uses (including churches and schools) and it would be permissible to list proximity of these uses as a factor to be considered by a governmental licensing board. But delegation of that choice to the religious body through a waiver or veto option is impermissible.

88. "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required." 494 U.S. 872, 890 (1990).

a historic preservation ordinance, but not a similar secular use, would violate the Establishment Clause.[89]

For the most part, though, Establishment Clause challenges of exemptions have been unsuccessful.[90] A typical result is *Goforth Properties, Inc. v. Town of Chapel Hill*,[91] in which the court held that a zoning provision exempting churches in the central business district from off-street parking requirements was reasonable given differences between churches and businesses relative to the times they generate peak parking demands.[92] However, an exemption based solely on religious grounds rather than on differential secular impacts would be suspect.

A local government must also avoid disproportionate impacts among different religions.[93] If one religion is singled out for favorable treatment, the regulation may well violate the Establishment Clause. On the other hand, if the regulation is tailored to prevent a particular religious practice, such as Santería animal slaughter in the *Lukumi Babalu Aye* case, the regulation violates the Free Exercise Clause. It is critical therefore that a land use regulation be applied uniformly across the board to all religious uses with similar impacts. Toward this end it is advisable to use objective land use standards where possible, thereby avoiding discretionary standards that heighten the risk of discriminatory application to those religious uses not favored by a particular community.

A case illustrating this principle is *Islamic Center of Mississippi, Inc. v. City of Starkville*,[94] which invalidated the denial of approval to use an existing house in a residential zone for a mosque. Considerable circumstantial evidence of religious discrimination was at play in this case, as the city had routinely approved all similar requests made by Christian entities. Yet the city council denied the approval for the Islamic Center on the basis of a neighbor's complaint about congestion, parking, and traffic problems. The court applied a *Sherbert*-like analysis in concluding that this application of the zoning ordinance substantially burdened religious practices by allowing no sites for worship within walking distance of campus and that it was not narrowly drawn in support of a substantial governmental interest.

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89. 521 U.S. 507, 536–37. The court in *Digrugilliers v. Consolidated City of Indianapolis* also discusses the potential infirmity of special protections afforded religious land uses. 506 F.3d 612, 616-17 (7th Cir. 2007).

90. *See, e.g.*, U.S. v. Maui County, 298 F. Supp. 2d 1010, 1015 (D. Ha. 2003).

91. 71 N.C. App. 771, 323 S.E.2d 427 (1984).

92. *See also* Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994) (upholding day care regulation exception for church nursery schools). Accepting the city's contention that the purpose of the exemption was to reduce governmental interference with religious organizations, the court held that this was an adequate secular purpose that did not endorse religious activities. *Id*.

93. Facial neutrality of the ordinance is inadequate. Consideration must also be given to the neutrality of the ordinance as applied. *Id*. at 534.

94. 840 F.2d 293 (5th Cir. 1988). *See also* Church of Jesus Christ of Latter-day Saints v. Jefferson County, 741 F. Supp. 1522 (N.D. Ala. 1990)., where the court held that a refusal to rezone to allow construction of a church on an eleven-acre tract in a low-density residential area of the county impermissibly burdened free expression of religion.

The religious beliefs of a person or a group are beyond the scope of governmental regulation. Regulating a particular land use activity out of disdain for the religious beliefs underlying that conduct or based on the type of people practicing those beliefs is impermissible.[95] A land use regulation aimed at a particular religion would violate both the constitution and RLUIPA. It is impermissible for a regulation to be targeted at minority or unpopular religious uses while exempting mainstream religious uses with similar land use impacts.[96] A rezoning aimed directly at preventing the construction of a particular church was held to be potentially invalid in *Abierta v. City of Chicago*.[97]

**8. Exclusion or "Unreasonable Limitation" of Religious Land Uses**

While a land use regulation that totally excludes places of worship from an entire jurisdiction are virtually unheard of, it is more common that an ordinance prohibits or limits places of worship in particular zoning districts, imposes minimum street frontage or lot size requirements, or substantially limit the location of associated religious uses such as schools, day cares, or shelters.

Many of these restrictions are addressed under the substantial burden analysis discussed above. However, some cases examine whether the limitations are sufficiently onerous as to constitute what RLUIPA prohibits – an ordinance that "unreasonably limits religious assemblies, institutions, or structures. For example, in *Chabad of Nova, Inc. v. City of Cooper City*,[98] the plaintiff challenged an ordinance limited religious assemblies in commercial zoning districts and imposed a minimum lot size and street frontage for both religious and other public assemblies. The court applied an analysis similar to the "reasonable alternative avenues of expression" analysis in First Amendment cases and concluded the ordinance imposed unreasonable limitations. Although the ordinance allowed religious assemblies in 85% of the city's land area,

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95. "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993). *See also* Locke v. Davey, 540 U.S. 712, 725 (2004) (upholding statute providing college scholarships but excepting those pursuing degrees in devotional theology as there was no showing of an animus towards religion).

96. "[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. [citations omitted]" Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

97. 449 F. Supp. 637 (N.D. Ill. 1996) (refusing to dismiss a claim based on an allegation that a rezoning initiated after notice of church's offer to purchase violated free expression, equal protection, free speech, and RFRA). *See also* Storm v. Town of Woodstock, 944 F. Supp. 139 (N.D. N.Y. 1996) (remanding case for additional fact-finding as to whether parking restriction was motivated by intent to inhibit "expressive, spiritual, and religious gatherings" at an open air meadow).

98. 575 F. Supp. 2d 1280 (S.D. Fla. 2008). The plaintiff proposed to operate a religious outreach center from leased space in a strip shopping center.

the street frontage and acreage requirements were deemed unreasonable in that they required a religious assembly to aggregate three to four typical lots in order to locate on a particular site.

Most courts have, however, noted that the fact that zoning restrictions and the marketplace combine to severely limit the availability of sites that are affordable to the particular religious plaintiff is not equivalent to exclusion nor is it a per se unreasonable limitation.[99]

### 9. Remedies

If a violation of RLUIPA is established, the law provides for "appropriate relief."[100] Declaratory, injunctive, and compensatory relief is available. In most instances the successful plaintiff secures an order directing that the land use approval be granted for the religious land use. Monetary damages incurred by the religious entity are not uncommon.[101] Also, if there is an associated Free Exercise claim, attorney fees may also be awarded.

A prevailing party making a successful RLUIPA challenge is entitled to reasonable attorney fees.[102]

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99. *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th cir. 2004); Petra Presbyterian Church v. Village of Northbrook, 409 F. Supp. 2d 1001, 1007 (N.D. Ill. 2006).

100. 42 U.S.C. § 2000cc-2(a).

101. *See, e.g.*, Reaching Hearts International, Inc. v. Prince Georges's County. 584 F. Supp. 2d 766, 791 (D. Md. 2008) (upholding jury award of $3.7 million in compensatory damages). News reports indicate the village settled the *Westchester Day School* religious school expansion case for $4.5 million.

102. 42 U.S.C. 1988(b). In *DiLaura v. Township of Ann Arbor*, 471 F.3d 666 (6th Cir. 2006), the court upheld an attorney fee award of $178,535.61 in a case involving a bed and breakfast providing complementary food and accommodations for guests staying for religious prayer and contemplation.