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Play Now, Pray Later: Regulating Sexually Oriented Businesses and Religious Facilities

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INTRODUCTION

The First Amendment of the United States Constitution provides "Congress shall make no law…abridging the freedom of speech, or of the press…." Under the Fourteenth Amendment, municipal ordinances are within the scope of this limitation on governmental authority.[1] The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. Certain adult uses have First Amendment protections and the U.S. Supreme Court has acknowledged that nude dancing found in adult cabarets lies on the outer margins of protected activity. [2] And, since the recent adoption of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), land use decisions which affect religious institutions are now subject to greater scrutiny and are mimicking arguments made in the adult use cases. While First Amendment jurisprudence has established certain protections for adult businesses and religious institutions, a city is not powerless to protect its citizens by imposing reasonable time, place and manner regulations.[3]

Adult use businesses and religious institutions continuously test the limits of their constitutional and statutory protections. When bringing suit against municipalities, adult use businesses also press the need for relevant studies and findings. Attorneys for religious institutions are following in the very same footsteps set by the adult use case law to support their claims, including demanding a city demonstrate alternative sites are adequate, and that the city process applications expeditiously. This paper will discuss the intersection of local regulation and the First Amendment as to adult uses and religious facilities.

ADULT USE

The regulation of adult businesses continues to be an issue for municipalities across the nation. Communities consistently struggle to adopt constitutionally sound ordinances that effectively regulate the adverse secondary effects caused by adult uses. The owners of these businesses are well funded and litigation abounds with numerous challenges to adult use ordinances on the grounds that a municipality's findings are insufficient and that the locational restrictions operate as a ban on adult facilities. In the seminal case of *City of Los*

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[1] *Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

[2] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991).

[3] *See Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791, 103 S.Ct. 2746, 105 L.Ed.2d 661 (1989) [the government may impose reasonable time, place and manner restrictions on speech as long as they are content neutral, narrowly tailored to serve a significant government interest and leave open "ample channels for communication"].

Angeles v. Alameda Books, the United States Supreme Court adopted a burden shifting standard whereby when a plaintiff casts direct doubt on a municipality's evidence for adopting an adult use ordinance, the burden shifts back to the city to supplement the record to support its theory for adopting the ordinance.[4] The adult bar has capitalized on this decision and regularly challenges adult use ordinances based on inadequate findings and lack of nexus to secondary effects.

The *Alameda Books* case began in 1977 when the City of Los Angeles conducted a study of adult businesses and found that concentrations of adult businesses are associated with increased rates of prostitution, violent crimes and thefts in the surrounding community. As a result of these findings, Los Angeles enacted an ordinance governing the location of such uses, prohibiting them from locating within 1,000 feet of each other, or within 500 feet of any religious institution, school or public park. Nearly twenty years later two bookstores acknowledged they were operating in violation of the distance requirements by operating both an adult bookstore and adult video arcade under the same roof. The adult use operators alleged that the City's ordinance was unconstitutional. The district court and Ninth Circuit found the ordinance unconstitutional, the Supreme Court reversed.

The Supreme Court held that Los Angeles could rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial government interest, and also cautioned that a municipality may not rely on shoddy data and reasoning, and that the evidence relied upon must fairly support a city's rationale for its ordinance.[5] For the first time, the Court declared that if a plaintiff casts direct doubt on a municipality's rationale, either by:

(1) demonstrating that the municipality's evidence does not support its rationale; or

(2) by furnishing evidence that disputes the municipality's factual findings, then the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.[6]

In 2008, in *Sensations, Inc. v. City of Grand Rapids*, the Sixth Circuit upheld an adult use ordinance adopted by the City of Grand Rapids, Michigan.[7] Upon learning that an individual planned to open an adult business in downtown Grand Rapids, a group of citizens came together to support an ordinance

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[4] 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002).

[5] *Id.*

[6] *Id.* at 426.

[7] 526 F.3d 291 (6th Cir. 2008).

regulating adult uses. The city council was apprehensive about adopting said ordinance because of the costs associated with potential litigation. The citizens group promised to fund any necessary legal defense with personal and private funding, and the ordinance was adopted in 2006. Sensations then filed a complaint against the city and the citizens group under Section 1983. The trial court granted the city's motion for judgment on the pleadings and awarded attorneys' fees to the citizens group.

The Sixth Circuit upheld the city's ordinance and upheld the trial court's decision that Sensations was not entitled to discovery that may have allowed it to disprove the negative secondary effects the city used to support its ordinance prior to the trial court entering judgment on the pleadings.[8] The Court found that Grand Rapids showed a nexus between the regulations and the secondary effects and therefore the ordinance was valid. However, the Sixth Circuit found that the trial court abused its discretion when awarding attorneys' fees to the citizens group. The Court noted that even if the ordinance were deemed unconstitutional, it might have dismissed the Section 1983 claims against the citizens group because there was no symbiotic relationship between the citizens group and the city, and therefore the citizens were not state actors who could be held liable under Section 1983.[9] Even though the citizens made substantial contributions to the city's defense, there was no symbiotic relationship for purposes of Section 1983. Despite this reasoning, the Sixth Circuit found that plaintiff's claims against the citizens group was neither frivolous nor unreasonable and therefore the prevailing defendant was not entitled to attorneys' fees.[10]

In a 2007 Ninth Circuit case, *Fantasyland Video, Inc. v. County of San Diego*,[11] the operators of two adult bookstores challenged San Diego County's adult business ordinance which limited the hours of operation for adult businesses, prohibited live nude dancing, required open peep show booths and limited adult businesses to an industrial area. The trial court found San Diego County's ordinance constitutional and the Ninth Circuit upheld the trial court's decision.

In reaching its decision, the Ninth Circuit held that the county could reasonably find that by restricting the hours of operation for adult businesses, crime, disorderly conduct and noise would all be reduced. This would assist the county in accomplishing its goal of reducing the secondary effects of adult businesses. The hours restriction was therefore substantially related to an important government interest.[12]

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[8] *Id.* at 298.

[9] *Id.* at 301.

[10] *Id.* at 302.

[11] 505 F.3d 996 (9th Cir. 2007).

[12] *Id.* at 1002.

The Ninth Circuit went on to hold that the county had a substantial interest in preventing sexual acts from occurring in peep show booths because such activities constitute lewd behavior pursuant to California Penal Code § 647(a).[13] Moreover, the Ninth Circuit found that Fantasyland never carried its burden of establishing that the open booth requirement was broader than necessary to curtail sexual activity in the booths. Because the county had a substantial government interest in preventing sexual conduct in the booths, and because the county's ordinance was not broader than necessary to prevent the conduct, the Ninth Circuit held that the county's ordinance was constitutional.[14]

In a much watched California state court case, a nude club known as "Flesh Club" attempted to recover more than a million dollars in lost profits from the City of San Bernardino (located in Southern California) after the court enjoined the business' operation as an adult use in the wrong zone.

In *Manta Management v. City of San Bernardino*,[15] the Flesh Club opened as a comedy club in the City of San Bernardino's ("San Bernardino") CR-3 zone. A few months later, Flesh Club brought in the nude dancing girls irrespective of the fact that adult uses were not allowed at this locale. The same day that Flesh Club began operating as an adult business, it filed suit against San Bernardino on the grounds that its location limitations for adult uses were unconstitutionally restrictive.[16] San Bernardino then filed an action against Flesh Club seeking to enjoin Flesh Club's operation as an adult use on the grounds that the business was a public nuisance operating in direct violation of the zoning code.

The trial court granted San Bernardino's motion for a preliminary injunction and ordered the adult club closed.[17] After rounds of appeals, the ordinance was held unconstitutional, and Flesh Club was awarded $1.4 million in

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[13] *Id.* at 1003.

[14] In *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009), the Sixth Circuit similarly upheld Knox County's amendments to its existing adult use ordinance. The amendments established a licensing requirement for adult businesses, regulated business hours, the manner in which adult films could be shown, established interior configuration requirements, and prohibited nudity and the sale of alcoholic beverages at adult use establishments. While plaintiff called into question the studies used by the county to demonstrate the negative secondary effects, the Sixth Circuit found that the county met its evidentiary burden and that the ordinance was a valid time, place and manner regulation.

[15] 43 Cal.4th 400, 75 Cal.Rptr.3d 353 (2008), *cert. denied* 129 S.Ct. 576 (2008).

[16] *Id.* at 404.

[17] *Id.*

damages for profits lost while it was subject to the injunction.[18] The Court of Appeal affirmed the jury award and found that a "city is liable for damages under Section 1983 if it chooses to enforce an unconstitutional ordinance by means of a preliminary injunction."[19]

The California Supreme Court reversed the Court of Appeal's decision, holding that when a court is given the facts necessary to adjudicate a motion for a preliminary injunction, or stay pending appeal, "the court's intervening exercise of independent judgment breaks the chain of causation for purposes of Section 1983 liability."[20] However, this rule does not apply when a judge reaches an erroneous decision because the judge was pressured or materially misled.[21] Because there were allegations that San Bernardino made materially misleading comments that led to the issuance of the preliminary injunction, the Supreme Court remanded the matter to the trial court.[22] Sketching out effective enforcement strategies for public entitles is an ever challenging issue and Manta Management is instructive in the inherent risks associated with such a strategy.

Alternative Sites

A recurring issue in adult use cases has been the availability of alternative sites. Under the seminal Supreme Court decision in *City of Renton v. Playtime Theatres, Inc.*, the Court held that the First Amendment requires the city to refrain from denying an adult business a reasonable opportunity to open and operate.[23] The Court explained that it is not necessary for a site to be commercially viable, and requiring adult use operators to "fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a violation of the First Amendment."[24]

In *Topanga Press v. City of Los Angeles*, the Ninth Circuit provided additional guidance regarding the standard to determine whether a site is available. Under *Topanga Press*, site availability is determined by assessing whether the relocation site is "part of the relevant market" and whether it is reasonable to believe the site will ever be available "to any commercial enterprise."[25] Further, under the Ninth Circuit's decision in *Isbell v. City of San*

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[18] *Id.* at 405.

[19] *Id.* at 406.

[20] *Id.* at 412.

[21] *Id.*

[22] *Id.* at 413.

[23] *Id.* at 54.

[24] 475 U.S. 41, 42, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

[25] 989 F.2d 1524, 1531-32 (9th Cir. 1993).

Diego, the list of available sites must take into consideration other zoning restrictions which might affect the availability of a site.[26]

While *Topanga Press* and *Isbell* have provided guidance in assessing whether a site is part of the relevant market and whether it is commercially available, there is no mathematical formula or litmus test established by the courts to determine the number of sites that must be available for adult uses. The issue is examined on a case by case basis, looking at the particular land use and demographic characteristics of the community.

In *Topanga Press*, the Ninth Circuit created certain parameters for determining whether sites are actually available in the relevant market, by examining the following:

1. Whether there is a genuine possibility that the site is potentially available. In other words, is it reasonable "to believe that [the site] would ever become available to any commercial enterprise."
2. If the sites are in manufacturing zones, are they reasonably accessible to the general public?
3. If the sites are in manufacturing zones, do they have proper infrastructure such as sidewalks, roads and lighting?
4. If the sites are in manufacturing zones, can they serve a generic commercial purpose such as retail or places of assembly?
5. Whether the sites are commercially zoned.[27]

The Court in *Topanga Press* rejected the City of Los Angeles' attempt to include sites that were clearly unavailable, such as areas under water, landfills and airport sites.[28] Other examples of unavailable sites include lands used for large warehouses, lands that are part of a sewage treatment facility, lands that are part of an existing hospital, and large oil refineries.

In *Tollis Inc. v. County of San Diego*, the San Diego County Board of Supervisors adopted a comprehensive adult use ordinance which required adult businesses to disperse to the industrial areas of the county.[29] The county adopted the ordinance as a means of combating crime, disorderly conduct, property value depreciation and other secondary effects. Two adult businesses operating in the county's unincorporated areas brought suit against the county on constitutional grounds and argued that by completely excluding adult uses from commercial zones, adult businesses were not given a reasonable opportunity to relocate.[30]

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[26] 258 F.3d 1108, 1113 (9th Cir. 2001).

[27] *Topanga Press*, 989 F.2d at 1531.

[28] *Id.* at 1532.

[29] 505 F.3d 935 (9th Cir. 2007), *cert. denied* 128 S.Ct. 2514 (2008).

[30] *Id.* at 941.

The Ninth Circuit upheld the county's ordinance. In reaching its decision, the Court found that determining whether the number of proposed sites meets the community's demand for adult businesses is one way to assess whether a city has given adult uses a reasonable opportunity to operate.[31] The San Diego ordinance only applied to the unincorporated areas of the county, and not to property located within any of the municipal boundaries. When dealing with unincorporated areas, the Ninth Circuit held that it is reasonable to also examine the availability of locations in neighboring municipalities.[32] Based on that reasoning, the sites identified by the trial court were available, and the county was able to limit adult uses to industrial zones.

In *N.W. Enterprises, Inc. v. City of Houston*, Houston amended its adult use ordinance to prohibit operation of adult establishments within 1,500 feet of any school, church, or other educational or charitable institution.[33] Operators of adult businesses then brought a First Amendment challenge against the city. The trial court granted the adult businesses' motion for summary judgment and struck down Houston's ordinance.

The Fifth Circuit held that Houston failed to demonstrate the existence of reasonable alternative sites. To meet its burden of establishing that the ordinance left open a reasonable number of available sites, Houston submitted an affidavit of one of its police officers, stating that the city had 128 sites available for adult businesses. While the Fifth Circuit found that the police officer's affidavit was not sufficient to demonstrate the availability of sites because it conflicted with other city testimony but recognized that generally "the provision of just one more site than the existing number of [adult businesses] satisfies a city's obligation to provide alternative avenues of communication."[34]

In *Isbell v. City of San Diego*, Isbell purchased a building in San Diego for the purpose of operating an adult business.[35] However, his building was located within 1,000 feet of a residential neighborhood in violation of the City's separation requirement. Isbell applied for a variance and was denied. Isbell then brought suit against the city on the grounds that San Diego's ordinance violated the First Amendment. The trial court granted San Diego's motion for summary judgment on all claims.

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[31] *Id.* at 942.

[32] *Id.*

[33] 352 F.3d 162 (5th Cir. 2003), *cert. denied* 543 U.S. 958 (2004).

[34] *Id.* at 182.

[35] 258 F.3d 1108.

On appeal, the Ninth Circuit found that San Diego failed to establish the existence of reasonable alternative sites. The Court held that an ordinance is not automatically constitutional simply when the supply of commercial sites exceeds demand. In other words, something more than the provision of a one for one replacement site for any existing users must be examined. *Isbell* noted that this is necessary to account for the potentially chilling effect that adult use zoning may have on prospective business owners.[36] On remand, the trial court found that San Diego failed to demonstrate the availability of reasonable alternative sites because the city failed to provide information on the number of individuals who made over the counter inquiry about zoning at sites proposed for adult uses, did not provide information regarding the total acreage available to adult businesses under its prior ordinance, information regarding adult businesses in comparable cities and did not offer information regarding the demand for adult entertainment within San Diego.[37]

Adult use businesses will continue to challenge adult use ordinances enacted by local governments. When dealing with issues related to site availability, the Supreme Court's *Renton* standard sets the standard requiring that a city's ordinance allow adult business(es) a reasonable opportunity to open and operate. Whether sufficient sites are available is a question of fact, and the analysis may differ between circuits. Based on the current case law, cities should continue to put into the record specific and detailed information about the availability of sites, demand for adult uses and the availability of adult uses in order to withstand First Amendment challenges.

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT ("RLUIPA")

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"; 42 U.S.C.A. §§ 2000cc *et seq.*) with the purpose of preserving the religious exercise provisions afforded by the First Amendment in the context of state and local land use regulations. RLUIPA provides a general rule prohibiting local government from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious institution, unless the government can show that the imposition of the burden furthers a compelling government interest and is the least restrictive means of furthering that compelling government interest. A land use ordinance is considered a substantial burden when it is oppressive to a significantly great extent.[38]

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[36] *Id.* at 1114-1115.

[37] *Isbell v. City of San Diego*, 450 F.Supp.2d 1143, 1151 (S.D. Cal. 2006).

[38] *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006).

RLUIPA contains provisions mandating that local land use regulations shall grant "equal treatment" to a religious assembly or institution; not discriminate against any assembly or institutions on the basis of religion or religious denomination; and not impose or implement a land use regulation that totally excludes religious assemblies from a jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

RLUIPA also provides rules for legal claims brought under the statute, including the shifting of the burden of persuasion to local government once a plaintiff produces *prima facie* evidence of a violation.

Substantial Burden

In *Petra Presbyterian Church v. Village of Northbrook*,[39] a church found property in the Village of Northbrook ("Northbrook") that it wanted to convert into a church and companion classrooms. The property was in an area designated as an industrial zone. To permit a religious use, the property would need to be rezoned and also obtain a special use permit. Prior to purchasing the property, the church made an informal request to Northbrook's governing board. The board made comments favorable to the proposal but did not reach a final decision. Based on those comments, the church purchased the property, contingent on the rezoning of the property. The church then made a formal application for the rezoning. Landowners expressed opposition to the rezoning, and without formally ruling on the matter, the planning commission directed staff to prepare documents consistent with the denial of the church's permit. Despite this action, the church moved forward and purchased the property.[40] Northbrook subsequently sought an injunction against the church which was granted, and the church then appealed arguing that Northbrook's zoning ordinance violated RLUIPA.

The Seventh Circuit held that the ban on churches in Northbrook's industrial zone does not create a substantial burden on religion, because if it did, all zoning ordinances that prevent churches from locating within any zone would constitute a *prima facie* violation of RLUIPA.[41] The Court further held that when there is plenty of land in a city where churches are able to locate, the fact that they are not permitted to build in every zone does not constitute a substantial burden on religion.[42] To successfully demonstrate a substantial burden, a church would need to demonstrate that land available for churches was scarce and therefore the exclusion of a church from a particular parcel created a substantial burden.

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[39] 489 F.3d 846 (7th Cir. 2007), *cert. denied* 128 S.Ct. 914 (2008).

[40] *Id.* at 847-848.

[41] *Id.* at 851.

[42] *Id.*

In *Westchester Day School v. Village of Mamaroneck*, the operator of a religious day school brought suit against the Village of Mamaroneck ("Village") after the Village denied the school's application for a special use permit to construct an additional building on its campus.[43] The school argued that by denying its application, the Village violated RLUIPA by substantially burdening the school's religious exercise.[44] The trial court ordered the Village to approve the school's application, and the Second Circuit affirmed the lower court's decision.

When reaching its decision, the Second Circuit considered several factors. First, the Court analyzed whether the Village's decision to deny the school's application was arbitrary and capricious. The Court then determined whether the school had any quick, reliable and financially feasible alternatives available to meet its needs absent the construction permit. Finally, the Court examined whether the Village's denial was conditional or absolute.[45] The Court found that whether denial was conditional or absolute was important because if there is a reasonable opportunity for an applicant to modify and resubmit an application, denial of the application does not place substantial pressure on the applicant to change its behavior, and therefore there is no substantial burden on religion.[46]

The Second Circuit found that the Village's denial was arbitrary and capricious because the decision was based on unsupported evidence.[47] When determining whether there were available alternatives, the Court found that the school could not have met its needs by using the existing buildings. It was necessary to construct an additional building to meet the school's expanding needs, and the planned location was the only site that could accommodate the new building.[48] The Second Circuit found the Village's denial to be absolute because the school's application could have been approved with conditions, but it was not. Further, if the school were to have prepared a modified application, the economic burden would have prevented construction from moving forward. Lastly, the Court determined that the Village would not likely have given reasonable consideration to another application submitted by the school.[49] Based on those factors, the Second Circuit held that school satisfied its burden in demonstrating

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[43] 504 F.3d 338 (2nd Cir. 2007).

[44] *Id.* at 344.

[45] *Id.* at 349.

[46] *Id.* at 352.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 352-53.

that there were no reasonable alternatives, and the school's religious exercise was substantially burdened by the Village's denial of its application.[50]

Equal Terms

In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,[51] a church purchased property in the commercial district, however churches were not permitted in the commercial zone.[52] Long Branch later adopted a redevelopment plan further restricting the uses permitted within the Broadway Corridor area. While commercial and entertainment uses were permitted in the area, churches and schools were not. The church filed a claim against Long Branch arguing that the redevelopment plan violated the equal terms provision of RLUIPA because it allowed secular assemblies to locate within the Broadway Corridor but excluded religious assemblies.[53]

The district court granted Long Branch's motion for summary judgment and the church appealed. The Third Circuit held that a plaintiff raising a claim under the equal terms provision of RLUIPA does not need to demonstrate that the land use regulation imposes a substantial burden on religion.[54] The Third Circuit further held that the equal terms provision requires the plaintiff to identify a secular comparator that is better treated and "that is similarly situated in regard to the *objectives* of the challenged regulation."[55] It is not necessary for the secular comparator to perform the same *functions* as the plaintiff.[56]

Whether or not the equal terms provision is subject to a strict scrutiny analysis was the last issue examined by the Third Circuit. The Court held that RLUIPA's equal terms provision does not require strict scrutiny analysis, but instead operates on a strict liability standard.[57] In reaching its holding, the Third Circuit reasoned that the strict scrutiny standard is applicable only for claims brought under the substantial burden provision of RLUIPA. Because the statute is structured in a manner that creates clear distinctions for each provision, it can be reasoned that Congress did not intend to subject claims brought under the equal terms provision to be determined using the strict scrutiny standard. By reaching this decision, the Third Circuit declined to follow the holding in the Eleventh

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[50] *Id.*

[51] 510 F.3d 253 (3rd Cir. 2007), *cert. denied* 128 S.Ct. 2503 (2008).

[52] *Id.* at 257.

[53] *Id.* at 262.

[54] *Id.* at 264.

[55] *Id.* at 268.

[56] *Id.* at 267.

[57] *Id.* at 268-69.

Circuit, which does require strict scrutiny analysis of claims brought under the equal terms provision of RLUIPA.

And, in *Midrash Sephardi, Inc. v. Town of Surfside*,[58] two synagogues sued the Town of Surfside alleging that the zoning ordinance excluding churches and synagogues from the business district while permitting private clubs and lodges, violated RLUIPA. The Eleventh Circuit held that private clubs and lodges *are* similarly situated to churches and synagogues, therefore the ordinance violated the equal terms provision.[59] The Eleventh Circuit further held that requiring the churches and synagogues to locate in the residential district did not violate the substantial burden provision of RLUIPA.

In reaching this determination, the Eleventh Circuit held that because RLUIPA does not define the terms "assembly" or "institutions," the terms must be construed in accordance with their ordinary meaning.[60] Generally, an assembly is considered a place where individuals come together for a common purpose. Pursuant to the town's zoning ordinance, churches and synagogues are considered places of assembly. The town's zoning ordinance defined private clubs as a place where individuals gather for social, educational or recreational purposes. The Eleventh Circuit held that similar to churches and synagogues, private clubs are places where individuals meet for a common purpose. Therefore, churches, synagogues and private clubs are all "assemblies" or "institutions" for purposes of interpreting RLUIPA. Because churches and synagogues were treated differently under the town's ordinance, there was a violation of the equal terms provision.[61]

While petitioners argued that a substantial burden was created by the town's zoning ordinance because congregants would have to walk farther to services, greatly burdening the young and the elderly, the argument was unconvincing.[62] While the Court empathized with the congregants who had to endure the hot, humid weather, the Eleventh Circuit held that walking a few additional blocks does not constitute a substantial burden under RLUIPA.[63]

In *International Church of Foursquare Gospel v. City of San Leandro*,[64] a church purchased property to relocate its mega church in the city's high-tech

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[58] 366 F.3d 1214 (11th Cir. 2004), *cert. denied* 543 U.S. 1146 (2005).

[59] *Id.* at 1231.

[60] *Id.* at 1230.

[61] *Id.* at 1231.

[62] *Id.* at 1227.

[63] *Id.* at 1228.

[64] 2008 WL 5384548 (N.D. Cal. 2008).

industrial zone. The church alleged that San Leandro's land use restrictions placed a substantial burden on religious exercise, that by denying its rezoning application, San Leandro was treating a religious assembly on less than equal terms with nonreligious assembly, and that denying the church's use of the property constituted total exclusion from the jurisdiction or unreasonable limits on religious assemblies pursuant to RLUIPA.

The district court held that San Leandro's land use restrictions did not place a substantial burden on religious exercise because its zoning ordinance was a law of general application that treated religious assemblies the same as other types of assembly uses.[65] Under the City of San Leandro's zoning ordinance, religious facilities were permitted in the residential zone and there were 45 churches already located within the city. San Leandro then added an overlay zone which added an additional 196 properties in both the commercial and industrial zone. Similar to adult use cases, when determining whether the zoning ordinance placed a substantial burden on religion, the district court looked to the availability of sites. The district court found that despite "the fact that there may be no other properties available to which the church can expand its operations *in the specific way it wants* does not mean that the City's zoning code imposes a substantial burden on the church."[66] Moreover, the costs associated with the acquisition of real estate are not generally recognized as a burden on religion.[67]

The district court also found in favor of San Leandro on the church's equal terms claims. The church argued that San Leandro's differentiation between "assembly uses," "entertainment activities," and "commercial recreation" violated RLUIPA because RLUIPA's legislative history suggested that an assembly is any gathering of people for any purpose.[68] By differentiating between those three uses and precluding assembly uses from operating in the overlay district, the church argued that San Leandro violated the equal terms provision. In reaching its decision, the district court opined that there was nothing in RLUIPA's legislative history that supported the church's contention that Congress intended to set aside all zoning regulations that distinguish between private or non-profit assemblies and commercial gatherings.[69] The district court found that San Leandro's zoning code does not treat churches on less than equal terms than other types of assembly uses because the "assembly use" designation applies to churches, social clubs, lodges, union halls and youth centers – a variety of different uses which all focus on gatherings. The district court held that those uses were distinct from

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[65] *Id.* at 14.

[66] *Id.* at 15.

[67] *Id.* at 16.

[68] *Id.* at 20.

[69] *Id.*

"entertainment activities" and "commercial recreation" uses. Therefore, San Leandro's zoning code was found to be neutral and of general application.[70]

There appears to be a trend in RLUIPA jurisprudence that courts will look to site availability as one means of determining whether a zoning ordinance creates a substantial burden on religion. In the Second Circuit, the Court will also look to whether the land use decision is conditional or absolute. The equal terms provision of RLUIPA is evolving and has not yielded a consistent holding related to the standard of review employed when analyzing the provision. The Third Circuit has held that the strict scrutiny standard does not apply to RLUIPA's equal terms provision, the Eleventh Circuit has held otherwise.

CONCLUSION

Prior precedent offers local government much guidance in the regulation of adult businesses. Cities may continue to regulate the adverse secondary effects caused by adult uses so long as their ordinances are founded on detailed analyses and findings. These are areas of extensive and expensive litigation, therefore due care and thoughtful analysis should be dedicated to needed findings and the administrative record.

Further, under the evolving RLUIPA case law, courts are focusing on the availability of sites as one means of determining whether a city's ordinance poses a substantial burden on religion and analogies can be drawn from the more developed adult use case law.

The intersection of local land use regulations and the First Amendment requires extra vigilance from municipal practitioners to ensure that existing and future ordinances are compliant with the ever shifting case law. By carefully balancing land use concerns with the First Amendment, cities are able to create ordinances which will improve the quality of life for their residents.

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[70] *Id.*