Avoiding "Substantial Burdens" on Religious Land Use Applicants, Part 2

by Lora A. Lucero



The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[1] cautions local governments not to "substantially burden" a religious land use applicant's right to free exercise, but provides little guidance about what actions might constitute a substantial burden:

> 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 [the land use regulation is] in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that compelling governmental interest.[2]

Challenges of zoning ordinances under RLUIPA are expressly contemplated.[3] The religious land use applicant has the initial burden of demonstrating that a land use decision or land use regulation is a "substantial burden," but the local government then has an opportunity to explain that a compelling governmental interest exists, and how the local government used the least restrictive means. Therefore, a finding that an applicant has been substantially burdened is not the end of the inquiry.

The federal circuits have devised slightly different definitions and tests, often leaving both religious land use applicants and local officials scratching their heads.[4] What is clear from my review of the reported decisions between 2001 and July 2009 (in the September/October 2009 issue of this publication) is that religious land use applicants prevailed in "substantial burden" claims less than 25% of the time. Those are pretty good odds from the local government's perspective, but one important factor is not apparent – namely, how often do municipalities capitulate, when threatened with RLUIPA litigation, to avoid the risk of paying the applicant's attorneys fees if the applicant should prevail? In that regard, Congress has stacked the deck in favor of the religious land use applicant because the Act authorizes attorney fees for the prevailing land use applicant, but not for a local government that successfully defends itself against a RLUIPA challenge.[5]

In addition to the examples discussed in the September/October 2009 issue, the courts have found no "substantial burden" in the following instances:

- A minimum 1,000-foot buffer requirement between non-agricultural, nonresidential uses in an agricultural district "to protect, preserve, and enhance the rural character and lifestyle of existing low density areas and agricultural use," did not substantially burden a church.[6]
- A denial of a conditional use permit (CUP) for a residential drug and alcohol rehabilitation program did not substantially burden a nonprofit, Men of Destiny Ministries, Inc., that ran the program.[7]
- Enforcing zoning regulations against a church that failed to apply for a special use permit (SUP) did not create a "substantial burden."[8]
- The denial of a SUP for a weekday parochial school on property outside of an urban growth boundary, although the county approved a SUP for the church and day-care center on the property, did not constitute a "substantial burden."[9]
- A city's refusal to re-zone industrial property at the request of a church wishing to expand did not qualify as a "substantial burden:" "RLUIPA does not require cities to grant churches preferential rights over other property owners, or to protect churches from the reality that the marketplace might dictate that certain facilities are not available to those who desire them."[10]
- A city's revocation of a certificate of occupancy because a cathedral rented its building out for performance entertainment to help pay the bills, was not a "substantial burden," despite the fact that the revocation barred the use of the cathedral for any purpose unless a new certificate of occupancy was granted. "[A] burden on a commercial enterprise used to fund a religious organization does not constitute a substantial burden…."[11]
- The denial of a variance to a church to permit a 250-square-foot electronic changeable-copy sign, that it wished to erect 25 feet high, was not a "substantial burden."[12]
- A denial of a SUP for a health ministry that served people with varying degrees of chemical sensitivities to common environmental pollutants, was not a "substantial burden."[13]
- A denial of a CUP for newly-acquired property on a main street where the city had been focusing its revitalization efforts, thus preventing a church from using the property for religious practices, did not create a "substantial burden."[14]
- The denial of a request, by a church, to change the sewer and water category designation on its property so that it could build a church and ancillary facilities, was not a "substantial burden." The church provided no facts demonstrating that the decision entirely prohibited it from building on its property or caused it to suffer financial loss, and assertions of overcrowding were not enough to support a "substantial burden" claim.[15]
- A county's land development code requirements, as applied

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> to a homeless shelter operated by a church, did not constitute a "substantial burden."[16]

It is important to stress that RLUIPA cases turn on the facts: thus, a careful reading of the entire opinion is important. There have been relatively few decisions where the court found a "substantial burden" existed, but those decisions are instructive. A summary of four important decisions in which the religious land use applicant prevailed on such a claim provides some pointers that every municipality would be wise to heed in order to avoid RLUIPA litigation—or, perhaps, to evaluate whether settlement is the best course of action if threatened with a RLUIPA "substantial burden" claim.[17]

Moratorium + Eminent Domain = A Sledgehammer

Cottonwood Christian Center was bursting at the seams. From 50 members in 1983, the church had grown to more than 4,000 adults and 1,200 youth members by 2002. It was conducting a television ministry, organizing national conferences, and holding six worship, services each weekend because its old site would only accommodate 700 people at one time. Church officials located land in the City of Cypress, a bedroom community in northwestern Orange County, California. It took it about a year to assemble six parcels into an 18-acre site for its new facility. The church wanted to build a 300,000 square-foot worship center with more than 4,700 seats, multiple classrooms, a youth activity center, gymnasium, and study rooms for after-school youth programs. A daycare center to accommodate 200 children (those of church members and the surrounding community) was also planned, as well as a religious bookstore.

Years earlier, the City had designated the Cottonwood property as part of a redevelopment area and zoned it PS (Public/Semi-Public), which permitted churches provided that a conditional use permit (CUP) had issued. Various development proposals and plans were considered, but no development occurred. The Cottonwood property was considered a "gateway property" which would determine how the rest of the redevelopment area would develop.

The timeline in the case is important. On October 6, 2000, Cottonwood submitted an application to the City, but was informed, on October 26, that its application was incomplete because it did not include design review studies. (Two years later, the city council ruled that the staff had erred because design review studies were not required before a CUP was granted.) Meanwhile, on October 30, the city council approved a 45-day moratorium on discretionary land use permits to allow its staff some time to explore a development plan for a "Town Center," which included the Cottonwood property. The moratorium was extended twice, ultimately lasting nearly two years. Because the church's application was deemed incomplete, it was caught by the moratorium. In February 2002, the City's redevelopment agency offered to purchase the Cottonwood property for $14,583,500, but the church refused the offer. In May, when the City filed an eminent domain action to take the property, the church sought a preliminary injunction to prevent the condemnation. The district court, concluding that the City's zoning and eminent domain actions substantially burdened the church and that the church was likely to succeed on the merits, granted injunctive relief to halt the condemnation.[18] The court noted that "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice religion. Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist."[19] In February 2003, the city council approved a settlement agreement that required the redevelopment agency to purchase the church's 18-acre parcel for $18.8 million. The church would then purchase 29 acres elsewhere, in the same redevelopment area, where the City would allow construction of the church and its related facilities.

Perhaps this was a win-win for both parties, but the facts smell fishy. "The City has done the equivalent of using a sledgehammer to kill an ant. Assuming that removing blight from the Cottonwood property was a compelling state interest, the City could eliminate the blight simply by allowing Cottonwood to build the church," the court said.[20]

Multiple Applications, a Cooperative Applicant, and No Hope for Success

The Guru Nanak Sikh Society of Yuba City, California wanted to build a temple that would accommodate religious ceremonies for no more than 75 people. In 2001, it found a small parcel (1.89 acres) in an R-1 district, and applied for a CUP. The planning department recommended approval, noting that the potential impacts for the residences in the area could be minimized through conditions attached to the permit. Although Guru Nanak accepted the proposed conditions, the planning commission unanimously denied the CUP application "based on citizens' voiced fears that the resulting noise and traffic would interfere with the existing neighborhood."[21]

The following year, Guru Nanak returned with a second CUP application, this time for a 28.79-acre parcel located in the AG (general agricultural) district. The property was surrounded by orchards and the nearest residence was at least 200 feet north of the property. Guru Nanak planned to convert an existing 2,300 square-foot house into a temple by adding 500 square feet to it but, as before, there would be no more than 75 people attending ceremonies. (Another Sikh temple was located on a ten-acre parcel less than a mile away.) Guru Nanak accepted all of the development conditions that the planning department and the state attached to the CUP and a negative declaration was issued. When the planning commission narrowly approved the CUP application, the neighbors appealed, citing concerns about traffic and property values. The Board of Supervisors unanimously reversed and denied the CUP. One supervisor rejected the application based on the "right to farm," saying the property had been agricultural and should remain agricultural;[22] another supervisor said the property "was too

far away from the city" and would not promote orderly growth.[23] Two other supervisors called the proposal "leapfrog development."[24]

The district court concluded the county had substantially burdened the applicant and granted summary judgment to Guru Nanak, finding that the county provided no argument regarding a compelling interest.[25] On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed, ordering the county to immediately approve the second CUP. It gave two reasons for finding a substantial burden in this case: first, the broad reasons given for both denials could easily apply to all future applications by Guru Nanak; second, Guru Nanak had readily agreed to all of the mitigation measures suggested by the planners, but the County Commissioners and Board of Supervisors found their cooperation insufficient without explaining why.[26]

The *Guru Nanak* lesson is that local government officials must meet religious land use applicants halfway in the application process. Multiple applications by a cooperative land use applicant is a wake-up call to planners and local officials that they should not ignore. Further, if an applicant receives multiple denials, there had better be very strong findings to support each denial, and local officials should be able to explain where and how the applicant might be successful in the future.

Delay, Uncertainty, and Expense Create "Substantial Burden"

In 2005, the U.S. Court of Appeals for the Seventh Circuit reversed a grant of summary judgment by the district court in favor of New Berlin, Wisconsin, after the appellate court concluded that the denial of a zoning variance substantially burdened the applicant, Sts. Constantine and Helen Greek Orthodox Church.[27] Again, the facts speak volumes.

In a two-year period, the church had acquired a 40-acre tract, zoned residential, seeking to build a new church for its growing congregation, to replace its existing church in a nearby community. The tract was bordered on one side by a Protestant church and, on the other side, by a tract owned by another Protestant denomination, which the City had already agreed to rezone so that a church could be built. The Greek Orthodox Church applied to rezone a 14-acre chunk of its larger 40-acre tract from residential to institutional, so that it could build its church at an estimated cost of $12 million. City planners were concerned about the request because, if the property was rezoned and the church was unable to raise the $12 million and decided to sell the property instead, a school or other non-religious facility might be built on the site. The church offered to couple the rezoning with a "planned unit development" (PUD) ordinance which would limit the site to church-related uses—if the church sold the land, the future owner would be subject to the PUD restrictions. Although this satisfied the planners, the city council denied the rezoning because it incorrectly thought a purchaser of the property would not be bound by the PUD.

In lieu of rezoning the land as institutional, the mayor suggested that the Greek Orthodox Church either apply for a CUP, which would allow the church to be built without the rezoning, or apply for a PUD overlay with the existing residential zoning. Neither alternative worked for the church. A CUP would expire within a year unless construction began, and the church didn't know whether it could secure the $12 million in time. The City maintained that the church could wait until it secured the funding before applying for the CUP, but the court decided that that was unrealistic because donors would be making contributions without any assurance that the building could actually be built. The church rejected the second alternative because it appeared to be a delay tactic—a PUD over a residential zoning designation would have the same effect as a PUD over an institutional zoning designation: both would bind future purchasers to the restrictions in the PUD.

Instead, the church filed suit, arguing that having to sell its land and find an alternative parcel, or be subjected to unreasonable delay because city officials were requiring it to restart the application process, amounted to a substantial burden. The district court granted summary judgment in favor of the City, assuming that the Seventh Circuit's previous RULIPA decision[28] required a religious land use applicant to show that there were no other parcels in the community on which it could build to establish a substantial burden under RLUIPA. On appeal, the Seventh Circuit reversed, explaining that its earlier decision was in the context of a facial challenge to a zoning ordinance, whereas the present case involved an as-applied challenge.[29] "That the burden would not be insuperable would not make it insubstantial,"[30] and the court found the delay, uncertainty, and expense in continuing to file applications with the City rose to a "substantial burden" and necessitated a remand to allow the City a chance to negotiate with the church (however, a new trial or new administrative hearings were not required).[31]

The lesson here is much the same as that in *Guru Nanak*, with the additional warning that local officials are charged with knowing the legal impact of the provisions of their land use code. When the mayor suggested that the church file a PUD application overlaying the existing residential zoning designation, the process began to smell fishy—if a PUD with industrial zoning would not satisfy city officials, the same fatal flaw would certainly exist with residential zoning, and the Seventh Circuit picked up on this inconsistency in the City's logic.

"Arbitrary Blindness to the Facts" Can Be Expensive

The Westchester Day School (WDS), a Jewish day-school, is located on 25.75 acres in the Village of Mamaroneck in Westchester County, New York. The school opened in 1948 and renovated two buildings from the late 19th century, a summer home and the stable, for classrooms. In the 1960s, the school built Wolfson Hall, and in 1979, a separate entity built a two-story Hebrew High School on the site. The school challenged the denial of its application for a special permit to expand its facilities. After five and half years of litigation, the Village agreed to pay $4.75 million to the WDS in settlement of its RLUIPA claim.

The Village zoning code allowed private schools to operate in the district with a special permit. In October 2001,

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WDS submitted its application to renovate Wolfson Hall and to construct a new building so that it could add 12 new classrooms, a learning center, small-group instructional rooms, a multi-purpose room, computer and science labs, and therapy, counseling, art and music rooms. All told, the expansion project was expected to cost $12 million. In February 2002, the Zoning Board of Appeals (ZBA) approved a negative declaration, finding that the project would not have a significant environmental impact. After a "small but vocal group" opposed the expansion project, the ZBA rescinded the negative declaration in August 2002, requiring WDS to prepare a full environmental impact statement. Instead, WDS sued, contending that the decision to rescind the negative declaration violated the RLUIPA.

The district court ruled the negative declaration had not been properly rescinded and was still in effect,[32] so the ZBA held a public hearing in May 2003 and denied the application for a special permit. "The stated reasons for the rejection included the effect the project would have on traffic and concerns with respect to parking and the intensity of the use. Many of these grounds were conceived after the ZBA closed its hearing process, giving the school no opportunity to respond. … [The district court] surmised that the application was in fact denied because the ZBA gave undue deference to the public opposition of the small but influential group of neighbors who were against the school's expansion plans."[33]

Nearly three years later, in November 2005, the district court ruled in favor of WDS and ordered the Village to issue a permit. On appeal, the Second Circuit affirmed, finding "the record convincingly demonstrates that the zoning decision in this case was characterized not simply by the occasional errors that can attend the task of government but by an arbitrary blindness to the facts."[34] In addition, the court considered two factors in determining whether WDS had been substantially burdened: first, whether there were quick, reliable, and financially feasible alternatives WDS could utilize to meet its religious needs without obtaining the special permit, and second, whether the denial was conditional.[35] The court found WDS couldn't simply reallocate space within its existing buildings, and the denial was absolute because the ZBA could have approved the school's application with conditions, but denied it instead; further, the Village failed to demonstrate it had used the least restrictive means to further a compelling interest.[36]

The *Westchester* decision is a big wake-up call for planners and local governments in several respects. First, it goes without saying that a decision must be based on the facts ascertained during the public hearing, not fabricated after the hearing has closed. Second, preparing strong findings for the decision is always important. Third, public opinion is important but must not overwhelm the facts. Basic fairness requires decision-makers to weigh the evidence and make the decision based solely on the facts. Finally, RLUIPA litigation can consume years and be very expensive.

Postscript

Most recently, two courts in Texas have found ordinances had substantially burdened religious land use applicants pursuant to the Texas Religious Freedom Restoration Act.[37] In June, the Texas Supreme Court determined that the City of Sinton's ordinance effectively banned the religious "halfway house" of a ministry that offered men, recently released from prison, free housing and religious instruction.[38] A month later, the U.S. Court of Appeals for the Fifth Circuit held that a City of Euless ordinance, prohibiting the keeping of certain animals for slaughter in residential areas, substantially burdened a Santeria priest's religious practices.[39]

Keeping current with RLUIPA land use decisions is a challenge. Two authors, Chaffee and Merriam, note that "[a]fter more than eight years of litigation under RLUIPA, a broadly applied definition of substantial burden has not emerged,"[40] and make the following recommendations for local government attorneys and planners:

- ensure zoning regulations provide for equal treatment,
- provide for suitable alternative locations for religious uses,
- produce an adequate and accurate record for a decision,
- provide realistic suggestions that align government and institutional objectives, and
- be willing to accept a conforming application.

Notes

1. 42 U.S.C.A. § 2000cc, *et seq.* (West 2009).
2. 42 U.S.C. § 2000cc(a)(1) (West 2009).
3. 42 U.S.C. § 2000cc-5(5) (West 2009).
4. *See* Edward W. McClenathan, *Swinging the Big Stick: How the Circuits Have Interpreted RLUIPA and What Practitioners Need to Know*, 36 Real Est. L. J. 405 (2008); *see also*, Part I of this series, *Avoiding "Substantial Burdens" on Religious Land Use Applicants*, by Lora A. Lucero, Municipal Lawyer, September/October 2009 at 6.
5. 42 U.S.C. § 1988(b) (West 2009).
6. Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006).
7. Men of Destiny Ministries, Inc. v. Osceola County, No. 6:06-cv-624-Orl-31D, 2006 WL 3219321 (M.D. Fla. Nov. 06, 2006).
8. Christian Methodist Episcopal Church v. Montgomery, No. 4:04-CV-22322-RBH, 2007 WL 172496 (D.S.C. Jan. 18, 2007).
9. Timberline Baptist Church v. Washington County, 154 P.3d 759 (Or. Ct. App. 2007).
10. Int'l Church of the Foursquare Gospel v. City of San Leandro, No. C 07-3605 PJH, 2008 WL 5384548 (N.D. Cal. Dec. 22, 2008).
11. Scottish Rite Cathedral Ass'n of Los Angeles v. City of Los Angeles, 156 Cal. App.4th 108 (Cal. Ct. App. 2007).
12. Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore, 962 A.2d 404 (Md. 2008).
13. Great Lakes Soc'y v. Georgetown Charter Twp., 761 N.W.2d 371 (Mich.

Ct. App. 2008).
14. Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980 (D. Ariz. 2009).
15. Bethel World Outreach Church v. Montgomery County, 967 A.2d 232 (Md. Ct. Spec. App. 2009).
16. Westgate Tabernacle, Inc. v. Palm Beach County, 14 So.3d 1027 (Fla. Ct. App. 2009).
17. *See* Chaffee and Merriam, *Six Fact Patterns of Substantial Burden In RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437 (2009).
18. Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).
19. *Id.* at 1226.
20. *Id.* at 1229.
21. Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006).
22. *Id.* at 983-84.
23. *Id.* at 984.
24. *Id.*
25. Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 326 F. Supp.2d 1140 (E.D. Cal. 2003).
26. "In denying the second CUP application, the Board of Supervisors disregarded, without explanation, the Planning Division's finding that Guru Nanak's acceptance of various mitigation conditions would make the proposed temple have a less-than-significant impact on surrounding land uses." 456 F.3d at 990.
27. Sts. Constantine and Helen Greek Orthodox Church, Inc. v City of New Berlin, 396 F.3d 895 (7th Cir. 2005).
28. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003).
29. 396 F.3d at 899-900.
30. *Id.* at 901.
31. *Id.*
32. Westchester Day School v. Village of Mamaroneck, 236 F. Supp.2d 349 (S.D.N.Y. 2002).
33. Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 346 (2d Cir. 2007).
34. *Id.* at 351-52.
35. *Id.* at 352.
36. *Id.*
37. TEX. CIV. PRAC. & REM. CODE § 110.003(a)-(b) (West 2009).
38. Barr v. City of Sinton, 295 S.W.3d 287 (Tex. 2009).
39. Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009).
40. Chaffee and Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437, 473-479 (2009). ML

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Unless the illness is caused by work-related factors, there is no worker's compensation coverage. As for wages, an illness on the road is no different than one at home. The employee is not working, and the same rules on wages and hours, and paid or non-paid sick leave, apply as they would if the person called in absent due to illness while at home.

The employer is generally not responsible for payment of medical care expenses, and might not be liable for extra hotel stay charges or travel re-booking charges. The employer does, however, have a duty to help the person and facilitate his or her return, and this may mean fronting or guaranteeing some of those costs. The employee may be charged back for these costs, but the primary current concern should be the welfare of the ill person.

Communicating with Employees

Employers should share materials that educate employees on the fundamentals of pandemic illness, the symptoms, modes of transmission, and personal and family response strategies. Other tips are:

- train supervisors to spot symptoms, and how to report and handle the situation of apparent symptoms in employees.
- educate employees, and continually emphasize sanitation and prevention practices relevant to the pandemic illness.
- anticipate employee fear and preempt the "rumor mill." Proactive communication will result in significant goodwill, and prevent having to later clarify false information or panicky reactions to rumors.
- ensure that your communications are culturally and linguistically appropriate for the workplace.
- share appropriate parts of your Pandemic Preparedness Plan with employees.
- develop methods for ongoing communication with employees, including daily or weekly updates, and enhanced call-in lines for absence reporting.
- remind employees about resources available to them (EAP plan, benefit counseling).
- urge employees to be proactive, take care of their own health, and take personal responsibility to stay abreast of developments by following reliable sources such as the CDC (www.cdc.gov) and www.flu.gov.

Conclusion

Establishing a plan will assist employers in maintaining essential functions and meeting commitments during a period of high absence. The planning process should involve communication with and input by employees and contractors regarding their operational and personal concerns about a pandemic and its effect upon them, their families, and income. Make employees aware of information sources regarding preparedness, as well as heightening awareness of health insurance and disability policies practices. Careful preparation and proactive planning is the key to minimizing disruption and surviving the pandemic.

Notes

1. U.S. Department of Health & Human Services, *H1N1 by the Numbers* (Dec. 14. 2009) at http://www.flu.gov/news/blogs/bythenumbers.html. This source states total U.S. cases are approximately 50 million, with the CDC estimating that there have been 200,000 hospitalizations and 10,000 deaths since the outbreak of the H1N1 flu in the spring of 2009.
2. 29 U.S.C. § 654 (West 2009).

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