THE IMPACT OF RLUIPA ON LAND USE REGULATIONS: UPDATE

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INTRODUCTION

In view of the action by the United States Supreme Court in striking down the Religious Freedom Restoration Act, 42 U.S.C.§ 2000bb, *see City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997), Congress adopted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in late 2000 (42 U.S.C. 2000cc, Pub.L. 106-274, Sept. 22, 2000, 114 Stat. 803). The new statute protects the practices of religious institutions from land use regulations that impose a "substantial burden" on religious exercise. The statute also protects institutionalized persons from imposition of substantial burdens on their religious practices by the government. This article will deal with the portion of the statute addressing land use regulations.

RLUIPA AND LAND USE REGULATIONS

RLUIPA provides that government may not ". . . impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person. . .", unless the government demonstrates that the burden imposed is, ". . .in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest" [42 U.S.C. 2000cc (a) (1) (A) and (B)].

RLUIPA applies to three categories of government action (1) if a ". . .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", (2) the substantial burden affects commerce, or (3) the substantial burden is imposed by ". . .a land use regulation or system of land use regulations. . ." when the government 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. [42 U.S.C. 2000cc (a)(2)].

As noted in *Grace United Methodist Church v. City of Cheyenne*, 2002 WL 31831443 (D. Wyo.2002) the three categories implicate, respectively, the Spending Clause (U.S. Const. art. I, sec. 8., cl.1), the Commerce Clause (U.S. Const. art. I, sec. 8, cl.3) and the Enforcement Clause (U.S. Const. amend. XIV sec. 5).

The Statute then goes on to state that implementation of a land use regulation in a manner which discriminates, excludes, limits or otherwise treats a religious institution or

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assembly on ". . .less than equal terms with a nonreligious assembly or institution" would be an action that substantially burdens religious exercise [42 U.S.C. 2000c (b) (1), (2) and (3)].

One of the most significant aspects of RLUIPA is that once a religious institution carries its burden of establishing that a regulation substantially burdens the exercise of religion, the burden shifts to the government to defend the regulation.

RLUIPA, therefore, applies to a broad range of activities regulated by various levels of government which have jurisdiction over land use. Zoning variances, site plan approval and special permits are among the areas of regulation that most frequently create a forum for a claim of RLUIPA violations. Zoning ordinances must be drafted in a manner that does not discriminate against religious exercise. Municipalities must, among other things, be certain that permitting requirements do not single out religious institutions and practices and that such permitting requirements are related in some way to potential impacts of the use. The boards and commissions which implement and interpret zoning ordinances and other land use regulations must also be sensitive to the potential for a claim that the zoning ordinance has been implemented in a manner that discriminates against religious exercise. For example, in an unreported case, one town recently denied a special permit to a Buddhist Temple citing the impacts of on street parking and potential noise. Yet, on street parking is permitted in the area and most significantly the primary purpose of the temple was silent meditation. The case was settled with the granting of the permit and the payment of attorneys' fees by the town.

IMPLEMENTATION OF RLUIPA

RLUIPA has the potential to impact virtually any decision implementing zoning and land use regulations. Religious exercise is broadly defined in the statute to include "…any exercise of religion, whether or not compelled by, or central to, a system of religious belief" [42 U.S.C. § 2000cc-5(7) (A)] and the ". . .use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose [42 U.S.C.§ 2000cc-5(7)(B)].

As RLUIPA is just over two years old, there is not a substantial amount of decided case law on the subject and even fewer appellate decisions dealing with the various challenges to the law and its application. Therefore, the full implications of RLUIPA are not yet known. Clearly, a number of religious organizations have availed themselves of the statute in order to overturn or to avoid regulations which those groups believe unfairly burden their exercise of religion.

Coupled with actions under 42 U.S.C. §1983, the lawsuits commenced so far have not only sought to reverse municipal actions but to obtain damages and attorney fees. A number of the actions commenced under RLUIPA have resulted in settlements in which

the municipality has agreed to permit the activity previously banned and to pay costs and attorneys' fees to the organization bringing the action. This has added to the lack of decided case law in the area.

As in the case of regulatory takings claims under 42 U.S.C. 1983, the issue of ripeness for judicial review also arises in RLUIPA cases. Thus, the Ohio Court of Appeals in *Scadden v. Willhite* 2002 WL 452472 (Ohio Ct. App. March 26, 2002) found that in a case in which a church had not sought administrative review of a zoning violation, the RLUIPA defense raised by the Church in response to a zoning violation was premature. However, in another case in which the municipal action had the effect of closing a church the court found that there was no need for further administrative action in order to make out a prima facie RLUIPA claim *(Murphy v. Zoning Commission of the Town of New Milford*, 148 F. Supp.2d 173 (D. Conn. 2001)).[2]

Although RFRA was held unconstitutional, the courts have held that the substantial burden test under RLUIPA is the same as under RFRA. Thus, the court must inquire into the importance of the religious practice in determining whether there is a substantial burden. The Court of Appeals for the District of Columbia held that preventing sale of t-shirts with a religious message was a restriction, at most, on one of the many ways of spreading the religious message which did not create a substantial burden on religious practice (*Henderson v. Kennedy*, 265 F.3d 1072 (D.C. Cir. 2001), cert. den. 122 S.Ct. 1537 (2002)).

One of several unsuccessful challenges to RLUIPA was in *Freedom Baptist Church of Delaware County v. Township of Middletown* , 204 F. Supp.2d 857 (E.D.Pa. 2002) where the constitutionality of the statute was upheld by the district court. Likewise, the Sixth Circuit Court of Appeals, without deciding the underlying issue, held that where a zoning ordinance prohibited all but residential uses on a parcel acquired by a religious organization the religious organization stated a claim under RLUIPA and reversed the District Court's dismissal of the action (*Dilaura v. Ann Arbor Charter Township*, 30 Fed Appx. 501 (6th Cir. Ct. 2002)).

CASE LAW UPDATE

There have been a number of recent developments in the Courts which, thus far, send an unclear message as to the likely ultimate resolution of the important issues raised by RLUIPA and its potential impacts upon local land use regulation.

In late 2001, the City of Chicago won a victory in the case *C.L.U.B. v. City of Chicago* 157 F. Supp2d 903 (N.D. Ill. 2001). In that case, the Court granted the City summary judgment on the RLUIPA claims brought by a group of churches challenging a City ordinance which required special use permits for churches to operate in commercial and business areas and barring the use in manufacturing districts. The City had amended

[2] The *Murphy* litigation continues with a motion for summary judgment by the Zoning Commission pending as of the writing of this article.

its ordinance to require special permits for other uses and removed any requirement from the ordinance that churches demonstrate the location was necessary for "public convenience". As a result the Court found the amendment removed any potential substantial burden on churches. The Court therefore concluded the City was entitled to summary judgment on the RLUIPA claim. The decision is however, on appeal to the 7th Circuit and oral argument was held in January 2003.

The case which perhaps foreshadows the most far reaching implications for municipalities is *Cottonwood Christian Center v. Cypress Redevelopment Agency,* 2002 WL 1827845 (C.D. Cal.2002). Issuing a preliminary injunction in favor of Cottonwood, the court found that part of the religious belief of the Church is to seek growth. Such growth allows its members to fulfill their belief in the need to minister to the spiritual and physical needs of the community and members of the Church. Further, the present size of the congregation exceeds the capacity of its building therefore resulting in multiple services. As a result, another of the Church's beliefs, the need for the members to come together as a single body, is violated.

While Cottonwood was in the process of acquiring a site for expansion and submitting applications to the City for approval of a project, the City was in the process of undertaking a redevelopment project of the Town Center, which included the parcels acquired by Cottonwood for its new facility. Due in part to administrative error, the Cottonwood application was delayed. Shortly after the City staff determined that Cottonwood's application was complete, the City sought to acquire the Cottonwood site. When Cottonwood declined the City's offer, a resolution of necessity was adopted and the City commenced a condemnation action.

Cottonwood then commenced a RLUIPA action against the City. Cottonwood challenged the City's failure to grant its application, the City's various zoning decisions related to uses in the area of its property and the City's attempt to condemn the property. Included in the challenge was a request for a preliminary injunction to prevent the condemnation of its property. The City moved to dismiss.

The Court denied the City's motion to dismiss and granted Cottonwood's application for a preliminary injunction. The Court clearly questioned the motives of the City in delaying Cottonwood's application and in seeking to acquire the site. In analyzing the issues, the Court determined that the City could not take the land on the basis that no church existed on the site, if the City had illegally thwarted Cottonwood's attempts to develop the site. Noting that RLUIPA provides a strict scrutiny standard for review of land use cases, once there has been a demonstration of a substantial burden, the Court found that, since it took Cottonwood five years to find a large enough site to accommodate its needs, Cottonwood would be in a position to prove there was a substantial burden on religious practice.

The *Cottonwood* court went on to find that while the elimination of blight (through condemnation) is a matter of substantial government interest, only a "compelling" interest can justify the burden to Cottonwood and further the construction

of the church itself would eliminate blight. The Court was also unimpressed with the City's arguments that it needed to generate revenue by having a tax paying land owner on the property and found that acquiring the property to turn it over to Costco did not constitute a public purpose for the taking of the land. Thus, the Court concluded that the balance swung in favor of granting Cottonwood the preliminary injunction applying, for the first time, the RLUIPA analysis to an eminent domain proceeding.

The *Cottonwood* case raises a number of serious issues regarding the scope of RLUIPA and may, as will be discussed below, provide an argument for finding RLUIPA unconstitutional. However, *Cottonwood* itself will go no further, as the newspapers have reported, as of February 24, 2003, the City of Cypress approved a settlement with Cottonwood.

However, the news is not all bad for municipalities. Summary judgment was denied to a church in *Grace United Methodist Church*, supra, in a decision in which the Court undertook a careful analysis of the scope of RLUIPA. There the Church had challenged the denial of a permit to operate a day care center in a low density residential zone. While noting that the strict scrutiny test established by RLUIPA is the ". . .most demanding test known to constitutional law," the court also noted that: (i) only religious and not commercial uses are protected; (ii) a substantial burden under the statute is not mere inconvenience, and (iii) the "burden" must be on a sincere exercise of religion. Consequently, the Court questioned whether the day care center, in this case, played any part in religious exercise. Stating that it could not grant summary judgment to the Church because there were genuine issues of material fact, the Court indicated there where three areas of inquiry.

First, the Court stated that there was a question of whether operating a day care center, which was not a primary or secondary school, constitutes a religious exercise merely because there was some religious component to the program. The Court was particularly impressed by the fact that no mention of any religious component to the day care had been raised in the license application and that the day care was to operate from 6:00 a.m. to 12:00 a.m.

Second, the Court found an issue of fact as to whether the regulations substantially burdened religious exercise when the result was merely that the day care center would have to operate in a part of the city zoned for such a use. The Court stated: "for a government regulation to substantially burden religious activity, it must have the tendency to coerce individuals into acting contrary to their religious beliefs" (*Grace United Methodist Church*, supra. page 11).

Third, the Court determined there was a question of fact as to whether the operation of the day care center is a "sincere" exercise of religion, noting there was evidence that the day care center might not be "religious in nature."

At last report, the *United Methodist Church* case was on the trial calendar for mid-March 2003.

The Ninth Circuit Court of Appeals rendered a decision in January 2003 which, while not addressing the intricacies of RLUIPA, demonstrates the seriousness of RLUIPA for municipal officials. Affirming the district court, the Ninth Circuit held in *Kaahumanu v. County of Maui,* 315 F2d 1215 (9th Cir. 2003) the Maui County Council's members may be individually liable for an alleged violation of RLUIPA. In this case the Plaintiff wanted to use her residential beach front property for a commercial wedding business. The use was not permitted without a conditional use permit (CUP). The CUP was denied and this RLUIPA action was commenced. The County Council, a legislative body, moved to dismiss the action in so far as it sought damages against the members of the council individually, based upon a claim that they are cloaked with legislative immunity.

The Court went into a detailed analysis of administrative versus legislative functions and concluded that issuing a CUP is administrative rather than legislative as a CUP involves an individual parcel and is not general in nature. While there is nothing remarkable about this analysis, the conclusion serves as a chilling reminder to municipal officials that the individualized land use assessments covered by RLUIPA may subject them to personal liability.

Finally, the case of *Madison v. Riter,* 2003 WL 179990 (W.D.Virginia 2003), while a RLUIPA case involving the rights of prisoners rather than a land use issues, may be the roadmap for a successful challenge to RLUIPA's constitutionality in land use cases. In a detailed analysis of the effects of RLUIPA on prisoner rights, the Court concluded that RLUIPA's increase in the level of protection of prisoners' religious rights, to the exclusion of other equally fundamental rights, violated the Establishment Claus of the First Amendment to the United States Constitution.

In analyzing the impacts of RLUIPA on prisoners' rights the Court noted that while accommodation of religion is not *per se* a violation, it becomes a violation when the result is to foster religion. While limiting its findings to prison cases the Court noted that, because of the very nature of prison, certain rights must be curtailed in prison. Further, as a general rule, the burden falls upon prisoners to demonstrate that a prison regulation is not rational and deference is given to the determination by prison officials that a particular regulation is needed. Yet, in the case of RLUIPA, the burden shifts from the prisoner to the prison officials and the prison officials must demonstrate a compelling state interest in the regulation. Therefore, RLUIPA results in greater protection for religious rights than other fundamental rights of prisoners and has the primary effect of advancing religious belief.

The Court gave as an example the case of a prisoner who wishes to keep obscene photographs in his cell in violation of prison regulations. The prisoner could make an argument that such a rule violates his First Amendment freedoms in which case the courts will give deference to the prison officials and the prisoner will have the burden of proving the rule is not rational. Or he could claim that such photographs are part of the exercise of his religion, in which case the burden shifts to the prison officials. The Court

stated that such a circumstance will give religious prisoners a higher status than non-religious prisoners and grants religious prisoners' additional benefits.

The Court went on to state: "[T]he Act, as it relates to the constitutional claims of religious inmates, raises the level of protection of religious rights only, leaving other, equally fundamental rights languishing under the pressures of judicial deference to the decisions of prison officials" (*Madison*, *supra* at 12).

But how could the analysis in the *Madison* case apply to land use regulations? Perhaps the *Cottonwood* case serves as a good example. In *Cottonwood, supra,* the Court applied the strict scrutiny test to condemnation of the Church property stating that while there was a substantial governmental interest in removing blight it was not a compelling governmental interest. Thus, the non-religious property owner subject to the same eminent domain law has the nearly insurmountable burden of attacking a governmental entity's attempt to condemn its property. However, using the logic of *Cottonwood,* in the case of the religious property owner the burden shifts to the governmental entity to then overcome the strict scrutiny test. In such circumstances it would appear the property rights of the religious property owner are greater.

While there has long been case law giving a level of deference to religious institutions in the context of certain zoning approvals, can it be argued that RLUIPA tips the balance? For example, states have regulations requiring scrutiny of the potential environmental impacts of projects before they may be approved. If a non-religious property owner has a project that has potential adverse environmental impacts there is usually a mechanism requiring mitigation of those impacts before approval can be granted. Under RLUIPA, could it be argued that the permitting authority must demonstrate a compelling governmental interest in mitigating those impacts before a religious property owner is required to undertake such mitigation? Does such action have the effect of granting greater property rights to the religious property owner thereby creating a higher status for religious property owners, and therefore, encouraging the establishment of religion?

CONCLUSION

Municipalities must look closely at their land use ordinances as well as the manner in which they implement those ordinances. The Courts have thus far given liberal interpretation to RLUIPA by sustaining a number of claims on a variety of grounds. While the reported case law does not yet demonstrate huge damage awards, the potential is clearly there. Moreover, a RLUIPA claim opens the door to large attorney fee awards that can overshadow the monetary claims of the litigants.