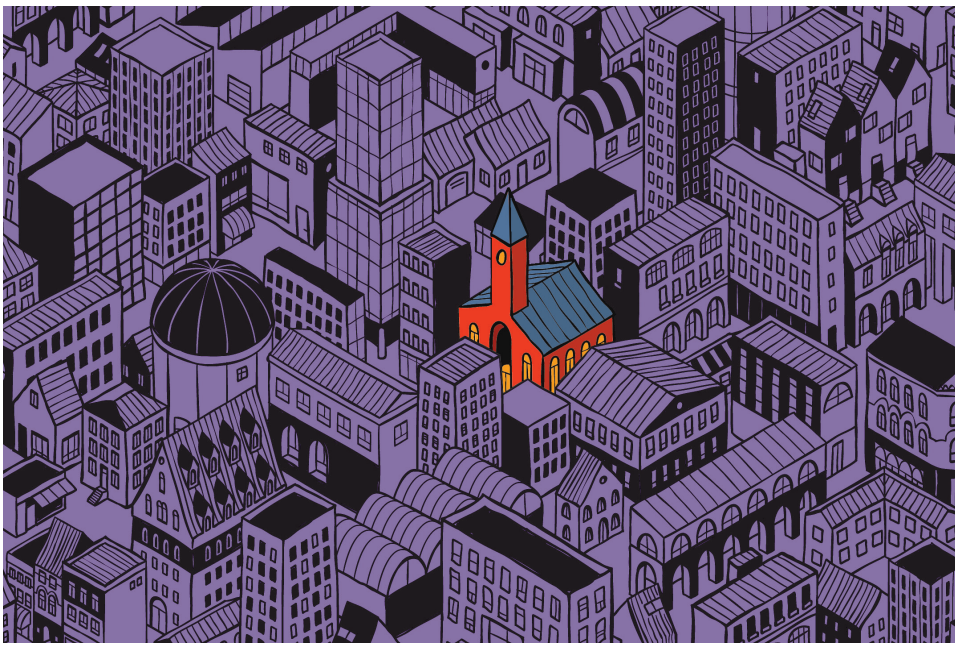
What You Didn't Know You Needed to Know About RLUIPA

By: **RUSSELL HILDEBRAND** | *Jones & Mayer, Roseville, California*



INTRODUCTION

The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), enacted in 2000, prohibits municipalities from implementing zoning and other land use regulations that impose a substantial burden on a person's or group's religious exercise.[1] In addition to injunctive relief, a prevailing plaintiff can recover its legal fees, which in addition to the municipality's own legal fees can reach the hundreds of thousands or even millions of dollars.

1. History RLUIPA's guidelines are best understood by examining its legislative history. It is the result of a longstanding disagreement between Congress and the United States Supreme Court.

The Free Exercise Clause of the First Amendment, which has been applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof…"[2] Starting in 1963, the Supreme Court determined that strict scrutiny was the appropriate legal standard for laws that burden the free exercise of religion.[3]

However, in 1990, the Court, in *Employment Division v. Smith*, clarified that strict scrutiny was not the appropriate test for determining the constitutionality of neutral laws of general applicability that incidentally burden religion.[4] Justice Scalia stated, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[5] The effect of this decision was clear—neutral laws of general applicability must only pass a rational basis test to survive constitutional scrutiny, regardless of incidental burden upon religion. This meant that the government need only show that the law bears a reasonable relationship to the attainment of some legitimate governmental objective.

The decision greatly tipped the scales back in favor of the government by significantly lowering the standard needed to justify these laws. After *Smith*, citizens could no longer rely on the Free Exercise clause to challenge neutral laws, such as zoning ordinances.

Congress rapidly responded to *Smith* by passing the Religious Freedom Restoration Act of 1993 ("RFRA").[6] RFRA broadly prohibited both the federal government and the states from substantially burdening a person's religious exercise "even if the burden results from a rule of general applicability"—unless the government could demonstrate that the burden survives strict scrutiny.[7]

Four years after its enactment, the Supreme Court invalidated RFRA as applied to the states and their subdivisions. In *City of Boerne v. Flores*[8] (holding that RFRA exceeded Congress's power under Section 5 of the Fourteenth Amendment).

In this arena, Congress' powers are limited to enacting legislation that is "remedial" in nature. Such powers are limited to correcting documented constitutional violations; there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[9] In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. It is a reality that numerous state laws, such as zoning regulations, 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.[10] Thus, the RFRA was struck down as applied to states and local governments.

Congress' second attempt at restoring strict scrutiny, RLUIPA, was a direct result of this tug-of-war between Congress and the Supreme Court. To avoid RFRA's fate, Congress wrote RLUIPA so that it only applied to regulations regarding land use and prison conditions, in response to a demonstrated record of discrimination in these areas.[11] Thus, RLUIPA provides "remedies aimed at areas where ... discrimination has been most flagrant;" an area where RFRA was lacking.[12] RLUIPA's constitutionality has been upheld by the Second, Ninth and Eleventh Circuits.[13]

As for enforcement and remedies under RLUIPA, the United States may bring an action for injunctive or declaratory relief to enforce RLUIPA, while *any* person may assert a violation and obtain "appropriate relief" against a government.[14] Appropriate relief means that civil damages could be available against the municipality for RLUIPA violations.

2. Section 2 of RLUIPA Targets Two Areas of Municipal Land Use Law

RLUIPA's first general rule prohibits a government from implementing a land use regulation that imposes a "substantial burden" on religious exercise, including a religious assembly or institution, unless the government demonstrates that it furthers a "compelling government interest" by the "least restrictive means."[15] Note the strict scrutiny standard.

RLUIPA contains three other rules related to discrimination and exclusion:

> (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.[16]

The "equal terms" and "substantial burden" provisions have been the most litigated language concerning local land use regulation and are the focus of this article. The statute includes a rule of construction, applicable to both Sections 2 and 3, that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[17]

Importantly, the sections operate independently, and court rulings holding that a claim based on the Equal Terms clause must show a substantial burden have been routinely overturned by the Appellate Courts.[18]

RLUIPA expressly provides a cause of action for violations of its requirements: "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[19] The phrase "appropriate relief" does not include money damages against states.[20]

In contrast, money damages are available under RLUIPA against political subdivisions of states, such as municipalities and counties.[21]

The "equal terms" and "substantial burden" provisions have been the most litigated language concerning local land use regulation and are the focus of this article. The statute includes a rule of construction, applicable to both Sections 2 and 3, that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."

3. Burden of Proof

Under RLUIPA, the government bears the burden of persuasion once a religious plaintiff establishes a prima facie case of a violation: If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of Section 2 of RLUIPA, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.[22]

The statute does not provide for "strict scrutiny" of a "compelling governmental interest" to see if the government can excuse the equal terms violation. The Constitutional phrases "substantial burden," "compelling governmental interest," and "least restrictive means," are all included in the "substantial burden" provision, not the "equal terms" provision.

The statutory burden of proof provision speaks to all parts of the statute, and also the Free Exercise Clause of the Constitution. It does not impose new language on any provisions of the statute. The equal terms provision does not use language from the Free Exercise Clause, or otherwise support the conclusion that Congress meant merely to meaninglessly say "the Constitution applies to land use provisions."[23]

The Ninth Circuit has held that an ordinance that expressly differentiates religious land uses from nonreligious land uses establishes a prima facie case for a facial Equal Terms Clause claim. As that court stated in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, "[T]he express distinction drawn by the ordinance establishes a prima facie case for unequal treatment."[24] This construction is widely followed by other circuits and accepted.

The critical statutory phrase "on less than equal terms with a nonreligious assembly or institution" is the focus in most cases. A leading case construing this language is *Elijah Group, Inc. v. City of Leon Valley*.[25] The court explained in Elijah Group that this statutory language "requires that the religious institution in question be compared to a nonreligious counterpart, or 'comparator.'"[26]

The Fifth Circuit would later elaborate that the approaches of other circuits to facial Equal Terms Clause challenges "fall roughly into two camps."[27]

> In one camp is the Eleventh Circuit, which treats all land use regulations that facially differentiate between religious and nonreligious institutions as violations of the Clause, but will nonetheless uphold such a regulation if it survives strict scrutiny review. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1231–35 (11th Cir. 2004).
>
> The other camp includes the Third, Seventh, and Ninth Circuits. Those circuits hold that a violation of the Equal Terms Clause occurs only if a religious institution is treated less well than a similarly situated non-

Continued on page 8

About RLUIPA cont'd from page 7

religious comparator. The Third Circuit requires the comparator to be "similarly situated as to the regulatory purpose." Lighthouse Inst., supra note 18, 510 F.3d at 266. The Seventh and Ninth Circuits require a comparator that is similarly situated with respect to "accepted zoning criteria." *Centro Familiar, supra* note 21, 651 F.3d at 1172–73; River of Life Kingdom Ministries v. Vill. of Hazel Crest, , 611 F.3d 367, 371–73 (7th Cir. 2010) (en banc).[28]

4. Application to Local Jails and Holding Facilities

One set of issues that may arise for a municipal attorney does relate to Section 3 of RLUIPA regarding religious freedoms for institutionalized persons, and may be of concern in your local jurisdiction. Be aware of requests for religious accommodations in your local jail or holding facility. A 2011 Ninth Circuit Court of Appeals case in Orange County, California held that the term "institution" includes "a jail, prison, or other correctional facility" and "*a pretrial detention facility*."[29]

Section 3 of RLUIPA provides that:

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in [42 U.S.C. § 1997], even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

In considering whether the Orange County Santa Ana Courthouse holding facility, where every day hundreds of individuals are detained in connection with court proceedings, is an "institution" as defined by RLUIPA, the court concluded in *Khatib v. County of Orange*[30] that the holding facility was included within the scope of "institution" under RLUIPA, which thus covers persons detained at the facility. RLUIPA requires accommodation of requests for religious sacrament and dress by detainees and prisoners however short the duration of their detainment in a local holding facility.[31]

In that case, at the booking counter a male officer ordered Khatib to hand over her belongings and remove her headscarf. Having her head uncovered in public, especially in front of men outside of her immediate family, is a "serious breach of [Khatib's] faith and a deeply humiliating and defiling experience." Weeping, Khatib explained that her religious beliefs forbade her from taking off her headscarf and pleaded with the officers to allow her to keep it on. Khatib was warned that the male officers would remove the headscarf for her if she did not voluntarily do so. Wanting to avoid being touched by the male officers—another violation of her religious beliefs— Khatib reluctantly complied. Khatib filed suit and the defense of the County was that the jail holding facility was not an institution and not governed by RLUIPA. The court disagreed and found liability on the part of Orange County.

5. Types of Cases Often Litigated Under RLUIPA

Numerous cases litigated under RLUIPA are Equal Terms Clause zoning cases in addition to substantial burden claims. A good example is *Opulent Life Church v. City of Holly Springs Mississippi*.[32] In *Opulent Life Church*, the City sought to enforce a zoning ordinance which "explicitly singled out churches for unfavorable treatment."[33] The Opulent Life Church, a small but growing congregation, sought to acquire space for a new worship center since its current place of worship could not accommodate a sufficient number of worshipers. The church also wished to have space to conduct various ministry activities including Vacation Bible School and Movies in the Park.

The church soon found an acceptable facility in Holly Springs' central business district. The church signed a lease agreement whereby the lease would commence when the church obtained the required land use and building permits from the City. The church submitted all proper paperwork to the City, but the City refused to approve the permits because it claimed the church did not meet the requirements of the City's zoning ordinance regarding churches. Among other things, the ordinance required churches to be subject to the approval of neighboring property owners, the mayor, and the board. Churches were the only use subject to this requirement.

The church brought suit in federal court alleging violations of RLUIPA and the Constitution. The church filed a motion for a preliminary injunction along with its complaint. The motion for the preliminary injunction sought to prevent the City from enforcing the discriminatory zoning ordinance. The district court denied the motion for preliminary injunction and concluded that the church had not shown a "substantial threat of irreparable harm." The judge issued this opinion before the City had even responded to the church's motion.

On appeal, the Fifth Circuit reversed the district court and found that the church had indeed shown a "substantial threat of irreparable harm." The court came to this conclusion based largely upon the church's claims under the First Amendment and RLUIPA. In one notable passage the court said: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[34] The court also included the following language: "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary" [for purposes of an injunction], and found that "Opulent Life has alleged violations of its First Amendment and RLUIPA rights and thereby satisfied the irreparable injury requirement."[35] The Fifth Circuit ultimately remanded the case to the district court for further proceedings.

San Jose Christian College v. City of Morgan Hill[36] was a substantial burden case in which Morgan Hill, California prevailed on a RLUIPA challenge. In 1999, Catholic Healthcare West ("CHW") closed the 60-bed St. Louise Hospital and adjoining medical offices in Morgan Hill. The 30-acre property then went on the market with the restriction that it could not be used for medical purposes, as CHW had moved its operation to nearby Gilroy. The city zoning for

the site is "planned unit development," which allows all uses shown on the development plan. But the PUD for the site was directed solely at medical uses.

The college filed an application for a zoning amendment so that the college could develop a school for 1,200 students, outdoor sports fields, a gymnasium, a theater/chapel and dormitories. City planners told the college the application was incomplete because it lacked a site plan, building elevations and a landscaping plan. The college responded with a scaled back version of the application, encompassing only the existing buildings and 400 students. At the same time, the college's marketing material trumpeted the original, larger project — a conflict that concerned planners because the California Environmental Quality Act ("CEQA") prohibits piecemealing a project. Ultimately, the Planning Commission rejected the zoning application because it failed to comply with the city's application requirements.

Among other things, the college argued that the city's application of its zoning ordinance and CEQA to the project violated RLUIPA because it posed a substantial burden to the college's religious exercise. The court rejected the argument.

> "[I]t appears that College is simply adverse to complying with the PUD ordinance's requirements," Judge Johnnie Rawlinson wrote for the court. "The city's ordinance imposes no restriction whatsoever on College's religious exercise; it merely requires College to submit a complete application, as is required of all applicants. Should College comply with this request, it is not at all apparent that its rezoning application will be denied."

Rawlinson continued, "[T]here is no evidence in the record demonstrating that College was precluded from using other sites within the city. Nor is there any evidence that the city would not impose the same requirements on any other entity seeking to build something other than a hospital on the property."[38]

Moreover, CEQA "adds nothing to the inconvenience otherwise imposed by the city's zoning application requirements," Rawlinson said. Being required to delineate the scope of development does not burden one's free exercise of religion, the court ruled.

> A critical principle to consider and not quickly dismiss is that a court may not second-guess a religious entity's sincere belief that certain activities are central to or required by its religion. This principle is likely to arise in a code enforcement situation and is critical to a municipal attorney's evaluation of potential RLUIPA challenges.

The court also rejected the College's arguments that the city violated its rights to freedom of speech and assembly because the college could not convene for education and worship on that specific site. The court held that city's ordinance and its enforcement of the law were content-neutral. "[T]he fact that the church's congregation cannot assemble at that precise location does not equate to a denial of assembly altogether,"[39] the court ruled.

The court in *San Jose Christian College* held "[f]or a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent. That is, a "substantial burden" on "religious exercise" must impose a "significantly great restriction or onus upon such exercise."[40]

6. Religious v. Secular Uses

A critical principle to consider and not quickly dismiss is that a court may not second-guess a religious entity's sincere belief that certain activities are central to or required by its religion.[41]

This principle is likely to arise in a code enforcement situation and is critical to a municipal attorney's evaluation of potential RLUIPA challenges. A complaint routinely arises in many situations where the facts of the case are far outside of societal norms and may seem to be farfetched to most of us. A good example to reference is *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.[42]

Though this case is based on a Section 1983 civil rights claim under religious freedom, it is a good example of how certain practices offensive to many citizens are still protected activity. Petitioner church and its congregants practice the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion. The animals are killed by cutting their carotid arteries, and are cooked and eaten following all Santeria rituals except healing and death rites.

After the church leased land in respondent city and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed, among other enactments-

Resolution 87-66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices;

> Ordinance 87-40, which incorporates the Florida animal cruelty laws and broadly punishes "[w]hoever . . . unnecessarily or cruelly . . . kills any animal," and has been interpreted to reach killings for religious reasons;
>
> Ordinance 87-52, which defines "sacrifice" as "to unnecessarily kill . . . an animal in a . . . ritual . . . not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed [food] establishment" if the killing is otherwise permitted by law;

Ordinance 87-71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87-52; and Ordinance 87-72 which defines "slaughter" as "the killing of animals for food" and prohibits slaughter

Continued on page 10

About RLUIPA cont'd from page 9

outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law.

Petitioners filed suit under 42 U.S.C. § 1983 alleging violations of their rights under, inter alia, the Free Exercise Clause of the First Amendment. Although acknowledging that the foregoing ordinances are not religiously neutral, the district court ruled for the city, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest, because any more narrow restrictions would be unenforceable as a result of the Santeria religion's secret nature. The Court of Appeals affirmed. The U.S. Supreme Court reversed the judgment.

Staying with the animal theme, we now move from chickens to bears. In *Blackhawk v. Pennsylvania*[43] the Appellate Court examined the Commonwealth of Pennsylvania's refusal to waive a wildlife permit fee for a Native American who kept two bears for religious reasons although the statute contained categorical waivers for zoos and "nationally recognized circuses."[44] In holding that the statute violated the Free Exercise clause, the court focused on the fact that categorical waivers for circuses and zoos — exemptions intended to "serve the Commonwealth's interest in promoting commerce, recreation, and education" and which "undermine the interests served by the fee provision to at least the same degree as would a [religious] exemption" — were available, but the Commonwealth refused to extend an individual religious waiver, which would have served "these or analogous interests."[45]

A case decided by the U.S. District Court for the Northern District of California was *Harris v. City of Clearlake*.[46] In that case the Right Reverend Smiley Harris obtained rights to a property in the City of Clearlake and openly and in violation of the City's ordinance, grew approximately 30 to 40 marijuana plants outdoors on the property without screening from public view. The City had declared such uses to be a public nuisance and the City's Code Enforcement Division issued a notice of code violation and abatement orders to the property owner to abate the nuisance by removing the plants.

Reverend Harris, whose Church of the Greater Faith and Redemption used marijuana in its services, filed suit against the City of Clearlake, the City Council members, and various staff, over the code enforcement action to remove the cannabis plants. The plethora of legal claims brought by Reverend Harris included a RLUIPA challenge to the City ordinance limiting cultivation of cannabis to six plants as allowed under California law.

The City argued that the ordinance was one of neutral and general application to all citizens of Clearlake. As such, though it may minimally intrude on Plaintiffs' religious activities, those activities must yield to the City's obligation to protect the health, safety and welfare of City citizens.[47] The City prevailed on a Rule 12(b)(6) motion to dismiss. The case was appealed to the Ninth Circuit, and was dismissed by the Court on procedural grounds prior to hearing the appeal.

7. Situations Likely to Involve Code Enforcement and Example Cases

Prayer meetings in homes - Chabad *Lubavitch v. Borough of Litchfield*[48] was a case involving a Chabad Lubavitch Orthodox Jewish congregation seeking to expand a house to use as a synagogue. The brief argued that discrimination does not need to be proven to make out a claim under RLUIPA's substantial burden provision. It also argued that in evaluating RLUIPA's nondiscrimination provision, the appropriate test is the multi-factor test outlined by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[49] for housing discrimination cases. The Court of Appeals agreed in a decision in September 2014.

Prayer meetings in commercial buildings - The U.S. Attorney Civil Rights Division in *United States v. City of St. Anthony Village*[50] brought a suit against the city in federal court in Minnesota in August 2014, alleging that denial of approval for the AbuHuraira Islamic Center to open a prayer facility in the basement of an office building in a light industrial zone violated RLUIPA. The suit alleged that the denial imposed a substantial burden on the Center, and that allowing "assemblies, meeting lodges, and convention halls," but not religious assemblies, violated RLUIPA's Equal Terms provision. A federal court in Minneapolis entered a consent order that permitted the Center to use the building as a place of worship on January 5, 2015.

Homeless services provided by religious groups - *Westgate Tabernacle, Inc. v. Palm Beach County*,[51] Westgate Tabernacle, Inc. is a not-for-profit corporation which operated a church located in West Palm Beach. The church and its pastors, the Reverends Avis Hill and Sherry McGee-Hill, opened the church property as a shelter for the homeless in Palm Beach County as a part of its Christian mission. Because Westgate was operating a shelter for more than six people without a CUP, the County issued a May 4, 1998, notice of violation entitled, "Operating a Homeless Shelter is Prohibited in this Zoning District." The notice gave Westgate two months to comply or attend a hearing before the Code Enforcement Board for the imposition of fines. Westgate filed, but then later withdrew, an application for a conditional use permit. Westgate then filed suit in state court under the Florida Religious Freedom Restoration Act and RLUIPA claiming a substantial burden on their right to the free exercise of religion. The substantial burden language in the Florida RFRA and RLUIPA are equivalent. The Florida Court of Appeal found that although running a homeless shelter may have been a deeply-held religious belief, under the specific facts before it, the church failed to prove that operating the shelter at that particular location was fundamental to its religious exercise. The court also affirmed the jury finding that the County's zoning code was a compelling government interest. The court stated "Neither FRFRA nor RLUIPA prohibits the application of valid, neutral zoning provisions to church property to curtail uses not permitted in the area."[52]

Expansion of existing facilities – In *Westchester Day Sch. v. Vill. of Mama-*

roneck,[53] The school contended that its expansion was necessary to provide adequate facilities for the religious education of its students, and that the board's unwarranted denial of a permit for the expansion unlawfully burdened the school's exercise of religion. The appellate court agreed, holding that the denial of the permit imposed a substantial burden on the school's exercise of religion without a compelling governmental interest. The board's action forced the school to continue teaching in inadequate facilities, and the board's stated reasons for denying the permit were based on the board's speculation and its own errors of relevant facts concerning traffic and parking. Further, there were no available alternatives for the school's expanding needs, and the board arbitrarily denied the permit application in its entirety rather than conditioning permit approval upon remedial efforts by the school. Also, the board's general interest in enforcing zoning and safety laws was not a compelling interest which justified imposing the burden on the school's exercise of religion, and the board in fact acted out of undue deference to the opposition of a small group of neighbors of the school.

8. Best Practices

The best way to avoid a RLUIPA claim is to plan for religious use. Regulation of religious uses and RLUIPA compliance are not mutually exclusive. Religious uses are not exempt from zoning. A religious group "has no constitutional right to be free from reasonable zoning regulations nor does [it] have a constitutional right to build its house of worship wherever it pleases."[54] Courts have consistently recognized "that land-use regulation is one of the historic powers of the [s]tates."[55]

A checklist for review and planning for religious uses would include:

(1) Understand where religious uses are permitted in your city and make sure the locations zoned for the use are not unreasonably limited.

(2) Do not distinguish between religious and secular assembly uses in your zoning ordinance. Rather, regulate assembly uses by size, where larger assemblies are permitted in the zones that better accommodate crowds and the impacts associated with crowds. Similarly-sized assembly uses should be subject to the same development standards, regardless of whether they are religious or secular.

(3) Understand any special development standards for assembly of religious uses that in application may also significantly limit locations where religious uses may be established.

(4) Continue to train your appointed and elected officials about RLUIPA.

(5) Remind your city officials not to make remarks that are discriminatory or could be perceived as being discriminatory.

(6) Avoid public discussions over whether a particular activity is religious. Development applications should be focused on land use impacts and issues, not on whether a particular activity is religious enough to be covered by RLUIPA.

(7) If the City is inclined to deny a particular application, make a good record to support the denial. Verify that the reasons cited by the decision-makers are actually supported by the City's code and past practices. Analyze whether there are quick, reliable and financially feasible alternative sites available, which may require the use of experts. Encourage applicants to redesign or reapply if a development proposal is unsatisfactory to the City.

The best way to avoid an RLUIPA claim is to plan for religious use. Regulation of religious uses and RLUIPA compliance are not mutually exclusive. Religious uses are not exempt from zoning. A religious group "has no constitutional right to be free from reasonable zoning regulations nor does [it] have a constitutional right to build its house of worship wherever it pleases."

RLUIPA itself provides that local governments may be protected from enforcement actions by taking corrective action, such as changing the policy or practice that results in a substantial burden on religious exercise, retaining the policy or practice and exempting the substantially burdened religious exercise, providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden or other violation of RLUIPA

According to the US Supreme Court, compelling interests are interests of the "highest order"[56] Although the legal standard for demonstrating a compelling interest is high, existing case law provides several examples, including:

- Protecting public health and safely objectives.[57]
- Preserving the rural and rustic, single-family residential character of a residential zone.[58]
- Enforcing zoning regulations to ensure the safety of residential neighborhoods.[59]
- Preventing crime.[60]

A compelling interest must be more than pro forma reliance on traditional zoning interests. It must be supported by a complete and comprehensive record of the municipality's interests, and local action must be tailored to meet those interests. Creating a complete and comprehensive record is especially important to defeat substantial burden claims, which are the perhaps the most fact-intensive type of RLUIPA claim.

9. **Two Final Points of Concern**

Review the basic provisions in your zoning code for churches. If your code singles out churches and has specific

Continued on page 12

About RLUIPA cont'd from page 11

requirements that differ from other similar secular non-religious uses such as community halls and fraternal organizations, then you're in trouble and wide open to a successful RLUIPA challenge. Look at your zoning code so you are prepared. Consider amending the code now, rather than waiting for a challenge.

Be prepared to deliver bad news when seemingly outlandish behavior is presented to the agency as religious sacrament and therefore protected activity under RLUIPA.

All of this doesn't mean a municipality loses all zoning and regulatory control over the approval of a religious activity, it just means you have to do an analysis grounded on factually supported land use impacts of the development, without consideration that the use is for a religion. In *Civil Liberties for Urban Believers v. City of Chicago*,[61] the court found regarding RLUIPA:

> [W]e find that these conditions [the costs of applying for and complying with special land use permitting requirements] do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. Significantly, each of the five individual plaintiff churches has successfully located within Chicago's city limits. That they expended considerable time and money so to do does not entitle them to relief under RLUIPA's substantial burden provision. Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations.
>
> Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.

Conclusion

In closing, RLUIPA issues are complex and fact-specific. A short checklist to consider before initiating a code enforcement action comes from the Department of Justice. According to the DOJ, when a city takes one of the following actions, it may constitute a substantial burden:

- effectively barring the use of a particular property for religious activity;
- imposing a significantly greater restriction on religious use of a property; or
- creating significant delay, uncertainty, or expense in constructing or expanding a place of worship, religious school, or other religious facility.[62]

The bottom line is that municipal lawyers stand the best chance of success by approaching RLUIPA issues methodically. Look at the situation with an open mind, consider all of the facts, and develop a thorough record.



Russell Hildebrand has spent his entire legal career representing public entities, including 14 years as City Attorney. At Jones & Mayer, he serves as City Attorney for the City of Fort Bragg and Deputy City Attorney for Bishop, Colusa, and Clearlake, providing assistance to city councils, boards, commissions, and staff on employment law and labor negotiations, sign ordinances and other Constitutional issues, and public works contracts. His numerous land use projects include reconstruction of the I-80/Sierra College Boulevard interchange, facilitating development of the two largest commercial developments in Northern California in 2014. He served on the League of California Cities Legal Advocacy Committee, and has lectured on Medical Marijuana Dispensaries, code enforcement, and Public/Private Development Partnerships. He served as board member and President of the NCCSIF JPA, which insures 23 Northern California cities. He is a graduate of the Lincoln Law School of Sacramento.

1. 42 U.S.C. §2000cc- 2000cc-5
2. Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).
3. Sherbert v. Verner, 374 U.S. 398 (1963) (Plaintiff had been denied unemployment benefits because she refused to work on Saturdays, which as a member of the Seventh Day Adventist Church, was her day of Sabbath. In ruling that the state's denial of benefits was a violation of her Free Exercise rights, the court applied strict scrutiny).
4. 494 U.S. 885 (1990) (plaintiff was challenging an Oregon law which criminalized the use of peyote. The Native American plaintiff claimed that the law burdened his Free Exercise of religion because his religious beliefs required that he use this hallucinogenic plant in ceremonial rituals).
5. 494 U.S. at 885.
6. 42 U.S.C. § 2000bb *et seq*
7. 42 U.S.C. § 2000bb1.
8. 521 U.S. 507, 532–36 (1997).
9. *Lukumi Bablu, supra* note 2, 508 U.S. 520 at 520.
10. *Id*. at 534-35.
11. Guru Nanak Sikh Soc. of Yuba City, 456 F.3d 978, 986, 994 (9th Cir. 2006) (citing H.R. Rep. No. 106–219, at 18–24 (1999) (summarizing the evidence from these hearings)).
12. *See Guru Nanak,* 456 F.3d at 994, *citing* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).
13. *Guru Nanak*, 456 F.3d at 994–95; Westchester Day School v. Village of Mamaroneck, 504 F.3d 338 (2d Cir. 2007); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).
14. 42 U.S.C. § 2000cc-2(a), (f).
15. 42 U.S.C. §2000cc(a)(1) (*emphasis added*).
16. 42 U.S.C. § 2000cc(b)
17. 42 U.S.C. § 2000cc-3(g).
18. *See* Lighthouse Institute for Evangelism v. Long Branch, 510 F. 3d 253, 3d Cir. (2007) citing to Courts of Appeals cases that have interpreted RLUIPA's Equal Terms provision that a plaintiff need not show substantial burden to prevail under it.

Continued on page 39

About RLUIPA cont'd from page 12

19. § 2000cc-2(a).
20. *See* Sossamon v. Texas, 131 S. Ct. 1651, 1655, 1658–59 (2011) (holding that RLUIPA does not unambiguously abrogate the sovereign immunity of the states from damages claims).
21. *See, e.g.*, Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1168–69 (9th Cir. 2011) (holding that municipalities and counties may be liable for money damages under RLUIPA; *see also Lighthouse Inst.*, *supra* note 18, 510 F.3d at 260–61; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977) (recognizing that political subdivisions of states do not enjoy Eleventh Amendment immunity)
22. § 2000cc-2(b).
23. *See Centro Familiar*, *supra* note 21, 651 F.3d at 1171-1172.
24. 651 F.3d 1163, 1168 (9th Cir. 2011).
25. 643 F.3d 419 (5th Cir. 2011), cited by the court in Opulent Life Church v. City of Holly Springs, 697 F.3d 279 (5th Cir. 2012).
26. Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419 at 422 (5th Cir. 2011).
27. Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 291 (5th Cir, 2012), *(citing Centro Familiar*, *supra* note 21, 651 F.3d at 1169, n. 25).
28. *Id.*
29. Khatib v. County of Orange, 639 F.3d 898 (9th Cir. 2011).
30. *Id.*
31. *Id.*
32. 697 F.3d 279 (5th Cir. 2012).
33. 697 F.3d 279 at 281.
34. 697 F.3d 279 at 295.
35. 697 F.3d 279 at 296.
36. 360 F.3d 1024 (9th Cir. 2004).
37. 360 F.3d 1024 at 1035.
38. *Id.*
39. *Id.*
40. 360 F.3d 1024 at 1034.
41. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 n.9 (1987) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."); Merced v. Kasson, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so." (*citing Smith*, 494 U.S. at 887)).
42. 508 U.S. 520 (1993).
43. 381 F. 3d 202 (3d Cir. 2004),
44. *Blackhawk*, 381 F.3d. at 211
45. *Id.*
46. No. 4:17-cv-05126-YGR (2017).
47. *Citing to Employment Division v. Smith* (494 U.S. 885 (1990) and *San Jose Christian College*.
48. 768 F.3d 183 (2d Cir, 2014).
49. 429 U.S. 252 (1977).
50. 14-cv-3272 (D. Minn. 2014).
51. 14 So. 3d 1027 (Fla. Ct. App. 2009).
52. *Citing to* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762-63 (7th Cir.2003).
53. 504 F.3d 338 (2d Cir. 2007)
54. Alger Bible Baptist Church v. Township of Moffatt, 2014 WL 462354, at *6 (E.D. Mich. 2014).
55. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 744 (1995).
56. *Lukumi Babalu Aye*, *supra* note 2, 508 U.S. 520 at 546.
57. Wisconsin v. Yoder, 406 U.S. 205 (1972).
58. Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, 734 F.3d 673 (7th Cir. 2013).
59. Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 108 (D. Conn. 2003), vacated, 402 F.3d 342 (2d Cir. 2005).
60. Harbor Missionary Church Corp. v. City of San Buenaventura, 642 F. App'x 726 (9th Cir. 2016).
61. 342 F.3d 752, 762-63 (7th Cir. 2003).
62. DOJ September 22, 2010 Statement. ML

Walking the Fine Line cont'd from page 17

23. United States v. Jones, 565 U.S. 400 (2012).
24. United States v. Kim, 415 F.Supp. 1252 (D. Haw. 1976).
25. Kyllo v. United States 533 U.S. 27 (2001) (Thermal sensing device to detect "grow house" is a search—illegal without warrant).
26. *Id.* The problem with this approach is discussed in *Jardines*, above.
27. Stefan Ducich, *These Walls Can Talk! Securing Digital Privacy in the Smart Home Under the Fourth Amendment*, 16 Duke L. & Tech. Rev. 278 (2018).
28. Drones are now regulated to some extent by the Federal Aviation Administration. 14 CFR, Title 17 Part 107. Unfortunately, there is nothing permitting or prohibiting drone searches or protecting curtilage privacy. Some states have prohibited police and code enforcement from using drones for close-up searches due to expectations of privacy.
29. Extended selfie sticks can be purchased cheaply on the open market so the *Kyllo* sophisticated- device-not-readily-available-to-the-public analysis would not provide assistance. They are much like a ladder over a back yard fence.
30. California v. Ciraolo, 476 U.S. 207 (1986). Marijuana viewable from lawful 1000 feet.
31. Order Granting Defendant's Motion to Suppress, United States v. Vargas, No. CR-13-6025-EFS, at 19 (E.D. Wa. Dec. 15, 2014). *See also*, State v. Davis, 360 P.3d 1161, 1172 (N.M. 2015) (holding that "prolonged hovering [by a helicopter] close enough to the ground to cause interference with [the defendant's] property" was an unconstitutional violation of the subject's expectation of privacy). These are discussed in a thought-provoking article: Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 Emory L.J. 527, 554 (2017) at fn. 99 & 100.
32. Fla. Stat. § 933.21 (2018).
33. Atwater v. Lago Vista, 532 U.S. 318 (2001).
34. Fla. Stat. § 933.30 (2018). ML